[*1]

Dragonetti Bros. Landscaping Nursery & Florist, Inc. v Verizon N.Y., Inc.
2021 NY Slip Op 50375(U)
Decided on April 28, 2021
Supreme Court, New York County
Cohen, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 28, 2021

Supreme Court, New York County

Dragonetti Brothers Landscaping Nursery & Florist, Inc., Plaintiff, Verizon New York, Inc., Defendant.

654342/2020

Counsel for Plaintiff:Erik A. OrtmannGiulia P. EscobarKAUFMAN DOLOWICH & VOLUCK LLP135 Crossways Park Drive, Ste. 201Woodbury, NY 11797

Counsel for Defendant:

Alan D Kaplan

Jina Moon

HERRICK, FEINSTEIN LLP

2 Park Avenue

New York, New York 10016

Kartik Naram

Principal Court Attorney to the Hon. Joel M. Cohen

60 Centre Street New York, NY 10007

646-386-5766

Joel M. Cohen, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17

were read on this motion toDISMISS.

Plaintiff Dragonetti Brothers Landscaping Nursery & Florist, Inc. ("Dragonetti") seeks compensation from defendant Verizon New York, Inc. ("Verizon") for "utility interference work" to secure and protect Verizon's overhead wires during Dragonetti's tree pruning work for the New York City Department of Parks and Recreation (the "Parks Department" or "City"). There is no dispute that Dragonetti performed the alleged utility work without obtaining an agreement from Verizon to do so. Indeed, Verizon took the position that such work was unnecessary. The gravamen of Dragonetti's Complaint is that Verizon, as a private

utility company, was legally obligated to perform or pay for work to protect or move its overhead wires to accommodate the Parks Department project and that Verizon is required to pay Dragonetti for such work even in the absence of any agreement between the parties. In a nutshell, Dragonetti alleges that Verizon forced it to foot the bill for work outside the scope of, but necessary to complete, the tree trimming contracts for the City.

Verizon seeks dismissal of the Complaint pursuant to CPLR 3211 (a) (1) and (7). Verizon maintains that it has no duty to pay Dragonetti for the alleged interference work (which it rejected) under any of Dragonetti's quasi-contract theories (quantum meruit, account stated, and unjust enrichment). For the reasons that follow, Verizon's motion is granted, and the Complaint is dismissed.

BACKGROUND

Dragonetti is a private landscaping contractor that entered into a pair of contracts with the Parks Department for the Block Pruning of Trees in the Boroughs of Queens and Brooklyn (the "Parks Department Contracts") (NYSCEF Doc No. 1, complaint ¶¶ 3-4; NYSCEF Doc No. 9 Exs. A-B [Parks Department Contracts]). It entered into the Queens Block Pruning Contract (Contract No. 84616B0132R) in 2016 and the Brooklyn Block Pruning Contract (Contract No. 84619B0141) in 2019 (Compl. ¶¶ 3-4).

Verizon is a private utility company that maintains overhead telephone poles and wires throughout New York City. Verizon is not a party to either of the Parks Department Contracts (Compl. ¶ 5; *see generally* Parks Department Contracts).

Dragonetti alleges that in the course of performing its tree pruning work for the City it encountered the need to perform additional work "to provide clearances for, protect, and otherwise work around" Verizon's overhead lines, which Dragonetti characterizes as "utility interference work" (Compl. ¶ 5). According to the Complaint, before beginning its work for the City and each time it identified Verizon facilities requiring support, work around, protection, and/or added safety measures, Dragonetti provided "sufficient notice to Verizon seeking direction as to how [Verizon] wished to proceed" (*id.* ¶ 9). Dragonetti further asserts that it [*2]repeatedly reached out to Verizon concerning Verizon's alleged obligation to support and protect its overhead lines in connection with the Parks Department project (NYSCEF Doc No. 14, aff of Nick Dragonetti ¶¶ 5-6).

Ultimately, however, and "[d]espite prior communications and a significant period of inaction/non-responsiveness" on Verizon's part, Verizon took the "blanket" position that "support/protection" of its lines was "not necessary" (*id.* ¶ 6). Per Dragonetti, Verizon made the determination that support and protection were not applicable or necessary, and that it would not pay protection costs, without even visiting the work sites to assess the "conditions" (*id.*). Dragonetti nevertheless performed the utility support/protection work, which it deemed necessary to progress with the landscaping project (Compl. ¶¶ 10-11; Dragonetti aff ¶ 8).

Dragonetti tried to negotiate compensation with Verizon but Verizon never agreed to a pricing structure—indeed, Verizon never acknowledged an obligation to pay Dragonetti at all (Compl. ¶¶ 12-14, 19). Dragonetti nonetheless invoiced Verizon (beginning on or about May 31, 2020) for the utility work (*id.* ¶ 18) and maintains that Verizon never specifically objected to any of the invoices (Dragonetti aff ¶ 14). There is no allegation that Dragonetti sought or obtained a determination from the City that such work was authorized or required.

Dragonetti now claims that it is entitled to compensation from Verizon for its services. The Complaint sets forth three quasi-contractual causes of action: quantum meruit, account stated, and unjust enrichment. Underlying each cause of action is Dragonetti's assertion that Verizon is legally responsible for (allegedly) necessary utility work under a common law duty relating to utility "interferences." As will be more fully explained below, this assertion is incorrect.

DISCUSSION

Legal Standard on a Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211, a pleading is liberally construed and the Court accepts the facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines "only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Under CPLR 3211 (a) (7), "a motion to dismiss is properly granted if the pleading fails to

state a cause of action and is, therefore, defective on its face" (*Urban Holding Corp. v Haberman*, 162 AD2d 230, 230 [1st Dept 1990]). Bare legal conclusions, "as well as factual claims either inherently incredible or flatly contradicted by documentary evidence," are neither presumptively true nor entitled to every favorable inference on a motion to dismiss for failure to state a claim (*Franklin v Winard*, 199 AD2d 220, 220 [1st Dept 1993]). "When evidentiary material is adduced in support of a motion pursuant to CPLR 3211 (a) (7), the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one" (*Stinner v Epstein*, 162 AD3d 819, 820 [2d Dept 2018], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Additionally, "[i]n assessing the legal sufficiency of a claim, the Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference . . . and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference" (*Lore v New York Racing Assn. Inc.*, 12 Misc 3d 1159(A), 2006 NY Slip Op 50968(U), *3 [Sup Ct, Nassau County 2006] [internal quotation marks omitted]). The Court may also "freely consider affidavits submitted by the plaintiff to remedy any defects in the [*3]complaint" *(Leon,* 84 NY2d at 88*).*

Verizon Has No Statutory Obligation to Pay Dragonetti

As an initial matter, there is no statutory basis for Dragonetti's claims. The New York City Administrative Code mandates that utilities bear the costs of protecting their *underground* facilities from street excavation/repairs and, even then, requires that the work be done "under the direction of" public officials (*see e.g.* New York City Administrative Code § 24-521 [b] [requiring utilities to bear the costs of removing or protecting "pipes, mains or conduits [that] are about to be disturbed by the constructing, altering or repairing of any sewer, culvert, water main or pipe . . . where necessary, under the direction of the commissioner of design and construction"]; *id.* § 19-143 [b] [requiring utilities "whose pipes, mains or conduits are about to be disturbed by the regulating or grading of any street . . . [to] remove or otherwise protect and replace" such interfering facilities "where necessary, under the direction of the commissioner" of the New York City Department of Transportation]).

There are no such statutory mandates with respect to protecting overhead wires (*cf. City of New York v Verizon NY, Inc.*, 4 NY3d 255, 258-59 [2005] [holding that New York City Administrative Code § 24-521—which punishes non-complying utilities through civil fines and subjects their executives to possible jail time—does not apply to aboveground poles and

wires]). And even assuming the statutory requirements could be read to cover Verizon's overhead wires, there is no allegation here that Dragonetti's work was done "under the direction of" agency officials (*see* New York City Administrative Code § 24-521 [b]; *see also id.* §§ 19-149 and 19-150 [providing for criminal and civil penalties for violations of Section 24-521 or any order issued by the commissioner pursuant thereto]).

Dragonetti's reliance on *DeMicco Bros., Inc. v Consolidated Edison Co. of NY, Inc.* (8 AD3d 99 [1st Dept 2004]) is misplaced. In that case, the First Department held on a motion to dismiss that a utility's failure to remove its overhead electric, cable, and telecommunication wires interfering with the plaintiff contractor's street milling and grinding work for the City could form the basis for the contractor's prima facie tort claim against the utility, given the utility's "affirmative legal obligation to remove or alter [the] wires for public works construction" (*id.* at 100, citing New York City Administrative Code § 24-521). The court, however, made this determination the year before the Court of Appeals held that New York City Administrative Code § 24-521 does not apply to overhead wires (*see Verizon NY*, 4 NY3d at 258-59). Moreover, in a later summary judgment determination in the same case, the court found that the utility's failure to perform its common law duty to remove wires could not support an inference of disinterested malice sufficient to sustain a prima facie tort because "in numerous locations plaintiff's work had been completed before defendants received the City's orders directing them to relocate the wires" (*DeMicco Bros., Inc. v Consolidated Edison Co. of NY, Inc.*, 48 AD3d 376, 376 [1st Dept 2008]). In the present case, in which there is no allegation of prima facie tort, there were no directions from the City requiring Verizon to take steps with respect to its overhead wires.

Accordingly, Dragonetti's statutory arguments are unavailing.

Verizon Has No Contractual Obligation to Pay Dragonetti

The Parks Department Contracts nowhere mention Verizon or require Verizon to do anything. Nor do they identify any work relating to Verizon's facilities, whether "interference [*4]work" or otherwise. Moreover, the City did not issue any instructions or directives regarding work concerning Verizon's facilities. Additionally, there are no addendums or side agreements (or a specific directive from the City) obligating Verizon to pay for any work related to the Parks Department Contracts.

In particular, there is no "Section U" addendum to the Parks Department Contracts that would establish privity of contract and the contractual framework for reimbursing Dragonetti for any "interference work." Contracts for City projects may include a Section U addendum that anticipates and identifies utility interference work associated with the project. The Section U protocol requires utilities to negotiate directly with and to pay contractors for the utility interference portion of the City project; it sets up a mechanism (expedited and binding arbitration) to resolve economic disputes regarding any interference work identified in the City contract as well as disputes over any unanticipated interferences (i.e., disputes regarding work for which no preconstruction agreement exists); and it "specifically reserves to the City the ultimate right to compel [a utility's] performance" by issuing directives to the utility (so-called "order outs") (*see Matter of Gen. Contrs. Assn. of NY, Inc. v Tormenta*, 180 Misc 2d 384, 1999 NY Slip Op 99153, *388-89, 392 [Sup Ct, NY County 1999] [describing Section U protocol and upholding its validity post-*Matter of Diamond Asphalt Corp. v Sander*, 92 NY2d 244 [1998], in which the Court of Appeals held that "joint bidding"—i.e., composite contracts for City work (public work) and interference work (private work)—ran afoul of General Municipal Law § 103 [1]'s requirement that municipalities determine the lowest responsible bidder for "public work"], *affd* 259 AD2d 177 [1st Dept 1999]; *see also Van Tulco, Inc. v City of New York*, 62 AD3d 567, 568 [1st Dept 2009] ["Consistent with the statutory language, the practice at the time this project was undertaken was for the contractor and utility companies to negotiate the cost of the work, and only upon the City's issuance of a 'work out' notice directing removal would the utility company be required to 'immediately relocate' its facility"]).

Here, unlike in a Section U scenario, there is no contract specification making Verizon a party to, or beneficiary of, the Parks Department Contracts. Indeed, the only requirement in the Parks Department Contracts is that Dragonetti give Verizon notice of any work affecting its facilities, but Verizon ultimately determines if anything needs to be done. Specifically, the Parks Department Contracts provide:

The Contractor shall cooperate with City Departments and utility companies in protecting such service and appurtenances, which may be expected to be a hazard while performing the work. All City Departments and utility companies who own or control any services or appurtenances which may be affected by the work must be given sufficient notice necessary to permit ample time to set up precautions ***as they deem necessary***.

(Parks Department Contracts, Part I-D, Article 15 [emphasis added]).

Notably, this contract provision does not require that Verizon bear responsibility for any work involving its "services" or "appurtenances"; clearly, it does not require Verizon to reimburse Dragonetti for any work Dragonetti performed relating to Verizon's telephone wires that *Dragonetti* deemed necessary. To the contrary, it was up to Verizon—not Dragonetti—to decide to set up "precautions" as Verizon "deem[ed] necessary." Accordingly, this provision cannot form the basis of an obligation on Verizon's part to pay Dragonetti for work that Dragonetti performed on its own accord (*cf. City of New York v Consolidated Edison Co. of NY, Inc.*, 114 AD2d 217, 219 [1st Dept 1986] [utility's franchise agreement with City expressly provided that the utility "shall, at its own [*5]expense, protect, alter or relocate all or any portion of [its] structures and equipment" if they interfered with public construction]; *Necaro Co., Inc. v Eighth Ave. R.R. Co.*, 220 AD 144, 145-46, 148 [1st Dept 1927] [finding that contractor was entitled to compensation from railroad company for protecting and supporting railroad tracks in order to complete sewer construction project where the City contract included language expressly requiring the railroad company to either perform the work or pay the contractor to do it]).

Verizon Has No Common Law Obligation to Pay Dragonetti

Absent any statutory authority or independent contractual responsibility requiring reimbursement, Dragonetti seeks to fit its claims within the purview of Verizon's common law obligation to cover the costs of utility protection/relocation. Contrary to Dragonetti's assertions, however, there is no common law rule requiring Verizon to pay for work where, as here, there is no order or directive from the City dictating that Verizon do so.

Verizon does not (and cannot) dispute that it must protect or move its facilities (or pay for the task) when they *interfere* with public construction and when the *City* requests protection/removal. Nor does Verizon argue that the City is responsible for the costs of the work relating to Verizon's wires that Dragonetti performed. Instead, Verizon maintains that the work at issue is not "interference work" because the City did not specifically identify any "interferences" in the Parks Department Contracts and never directed Verizon to move or protect its lines.

The common law relating to utility "interferences" is settled: As a precondition to the privilege to use public property to install and maintain utility equipment, a private utility company like Verizon has a duty, under certain circumstances, to see that interfering facilities are protected or moved at its own expense during municipal infrastructure projects (*see Matter of Diamond Asphalt Corp. v Sander*, 92 NY2d 244, 249 [1998]; *Verizon NY*, 4 NY3d at 258 [explaining that utility companies "have a longstanding common-law obligation to move their facilities when they interfere with municipal work projects"]).

This arises, however, only when there is some instruction from the municipality involved —that is, a utility is required to perform or pay for interference work if there is express contract language directing it to do so or a state or local authority orders the utility to do so (or both). All of the cases upon which Dragonetti relies recognize this point (*see e.g. Verizon NY*, 4 NY3d at 257-58 [dismissing action to enforce statutory fines for untimely compliance with City-issued "order out" directing Verizon to remove or reconfigure overhead poles and wires so sewer project could begin because New York City Administrative Code § 24-521 does not apply to aboveground facilities]; *City of New York v Consolidated Edison Co. of NY, Inc.*, 274 AD2d 189, 192-93 [1st Dept 2000] [upholding constitutionality of City-issued "order out" notices and imposition of interference costs even though defendant's facilities were maintained pursuant to private easements because New York City Administrative Code § 24-521 [b] does not distinguish between easement-based installations and those maintained under a franchise with the City]; *Consolidated Edison Co. of NY*, 114 AD2d at 220-21 [statutory notice of commencement of street reconstruction triggered utility's statutory and franchise-specific duties to remove or protect in place at its own expense interfering underground facilities, and City subsequently "sent directives to [utility] to 'eliminate' or remove [the] interfering facilities, and to 'clear' or protect others" but utility refused to comply]; *DeMicco Bros., Inc.*, 48 AD3d at 376 [on plaintiff contractor's motion for summary judgment, utility's failure to perform its common law duty to remove overhead wires allegedly interfering with street repairs could not support an inference of disinterested malice sufficient to sustain a prima facie tort where [*6]defendant utilities contended that "in numerous locations plaintiff's work had been completed before defendants received the City's orders directing them to relocate the wires"]; *see also Consolidated Edison Co. of NY, Inc. v City of New York*, 171 AD2d 865, 866 [2d Dept 1991] ["Pursuant to an October 13, 1988, resolution by the New York City Board of Estimate, [Con Ed] was required to place its utility lines underground in coordination with a certain portion of a capital highway reconstruction project on Northern Boulevard"]; *New York Tel. Co. v City of New York*, 95 AD2d 282, 283

[2d Dept 1983] ["Before construction began, the New York Telephone Company [and other utilities] were directed [by the City] to remove their underground facilities from a certain portion of Van Brunt Street in Brooklyn"]).

Indeed, the century-old common law rule [FN1] is grounded in *governmental* authority—namely, a municipality's general police power to direct a utility to move or protect its facilities whenever "the public health, safety or convenience [so] requires" (*New York Tel. Co.*, 95 AD2d at 283-84 [explaining that "[w]hen a municipality directs a utility to relocate its facilities, it does so in the exercise of its governmental function and general police power" and holding that a utility cannot recover expenses incurred as a result of government-directed removal of its facilities, where removal ultimately proves unnecessary, under an ordinary negligence standard; rather, the utility must show that the municipality's directive to relocate was issued arbitrarily or wantonly]; *see also Transit Commn. v Long Is. R.R. Co.*, 253 NY 345, 351 [1930] [utility's privilege or franchise to lay and maintain pipes under public streets "is at all times subject to the police power of the State" and the utility "takes the risk of their location and is bound to make such changes as the public convenience and security require, at its own cost and charge"]; *Norfolk Redevelopment & Hous. Auth. v Chesapeake & Potomac Tel. Co. of Virginia*, 464 US 30, 35 [1983] ["Under the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way *whenever requested to do so by state or local authorities*"] [emphasis added]).

Accordingly, a private contractor performing municipal work has no independent authority to require a utility to undertake or pay for work relating to the utility's facilities that the *contractor* decides is "interference" work. Rather—and critically—cases addressing a contractor's claim against a utility vis-à-vis the utility's protection/relocation obligations uniformly involve a contractual (or statutory) duty or City directive (*e.g. Necaro Co.*, 220 AD at 146 [noting that "[t]he president of the borough of Manhattan and the plaintiff . . . served notice in writing on the defendant, directing it to protect its structures and tracks" but the defendant refused to comply]; *Trocom Constr. Corp. v Consolidated Edison Co. of NY, Inc.*, 7 AD3d 434, 435 [1st Dept 2004] ["When Trocom and Con Ed could not resolve [their dispute over who was responsible for interference work], the City issued an 'Order Out Notice' . . . which directed Con Ed to 'immediately relocate, remove, or alter [its interfering] structures at [its own] expense'"]; *Nicholas Di Menna & Sons, Inc. v City of New York*, 114 NYS2d 347, 350 [Sup Ct, Bronx County 1952] ["the City notified plaintiff that, in accordance with Article XXXII of the City Contract, plaintiff should negotiate with the Railroad Company for the support of the duct line"]).

For example, in *Van Tulco, Inc. v City of New York*, 62 AD3d 567 [1st Dept 2009], a contractor hired by the City to rebuild a bridge sought damages allegedly caused by the defendant [*7]utilities' failure to timely move a gas main and telephone conduits despite receiving statutory notice from the plaintiff (under New York Administrative Code § 19-143 [a]) that these facilities were impeding construction. The trial court held that this pre-excavation notice triggered the utilities' codified duty to remove or protect any equipment interfering with the renovation of the bridge. The First Department disagreed, explaining that although utilities have a longstanding common law obligation to move their facilities when they interfere with municipal work projects, there was "no basis for plaintiff's claim that it could unilaterally require defendants to move their facilities simply by giving notice of the project," because the common law obligation (codified in New York Administrative Code § 19-143) requires utilities, upon receipt of preconstruction notice from the contractor, to "'remove or otherwise protect and replace their pipes, mains and conduits . . . where necessary, *under the direction of the commissioner*' . . . of the New York City Department of Transportation" (*Van Tulco*, 62 AD3d at 568, quoting New York City Administrative Code § 19-143 [b] [emphasis added]). Because the defendant utilities "established there was never a determination that removal of their facilities was necessary, or any direction from the City requiring their removal," they were entitled to summary judgment dismissing the complaint (*id.*; *see also Lizza Indus., Inc. v Long Is. Light. Co.*, 44 AD2d 681, 682 [2d Dept 1974] [noting that the "cases cited by plaintiff in support of its contention that the common law imposes the . . . burden [of protecting or relocating utility installations] on the utility company is misplaced . . . because in none of those cases was a private corporation allowed to pass such a burden upon a utility company"]).

Dragonetti's reliance on *Perfetto Contracting Co., Inc. v Brooklyn Union Gas Co.* (42 Misc 3d 1207(A), 2014 NY Slip Op 50004(U) [Sup Ct, Kings County 2014]) is misplaced. In *Perfetto*, the plaintiff contractor sought compensation from the defendant utility for alleged utility interference work it had to perform to complete its street milling, sewer trench restoration, and sidewalk installation work pursuant to various City contracts. There, as here, the plaintiff asserted that, despite the absence of a direct contractual relationship, it was "entitled to payment [from the defendant utility] in light of the duties imposed on utility companies relating to utility interference work by the common law" (*id.* at *2).[FN2] However, in distinguishing *Van Tulco*, and unlike in this case, the *Perfetto* court noted that the defendant utility "made no argument regarding the necessity of the utility interference work" and the City had issued notices "requiring [the utility] to move and/or protect its facilities with respect to the . . . street milling project" (*id.* at *5 n.8).

In sum, there is no basis under the common law for Dragonetti to unilaterally require Verizon to pay for work not identified in the Parks Department Contracts as "interference work" and that the City never directed or determined was necessary to complete Dragonetti's tree trimming project (*see Van Tulco*, 62 AD3d at 568).

Quantum Meruit

Dragonetti's quantum meruit claim must also be dismissed. "To prevail on the equitable theory of quantum meruit, a party must prove (1) performance of services in good faith, (2) acceptance of the services by the person [or entity] for whom they were rendered, (3) an expectation of compensation, and (4) the reasonable value of the services performed" (*Matter of Santander [*8]Consumer USA, Inc. v Kobi Auto Collision & Paint Ctr., Inc.*, 183 AD3d 984, 987 [3d Dept 2020] [internal quotation marks omitted]; *see also Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 484 [1st Dept 1991] [setting forth elements of quantum meruit claim]).

First, Dragonetti's conclusory assertion that Verizon "accept[ed]" Dragonetti's services (Compl. ¶ 24) is belied by the more detailed allegations made elsewhere in the Complaint. Specifically, although Dragonetti reached out to Verizon seeking direction on how it wanted to proceed, Verizon did not perform any protection work itself, did not acknowledge any obligation to pay for the work, and never agreed to any prices or rates for the work (*id.* ¶¶ 9-14). Indeed, Dragonetti admits that Verizon expressly repudiated the need for any work relating to its overhead lines (Dragonetti aff ¶ 6). Simply put, there was no "agreed exchange" supporting Dragonetti's assertion that it is entitled to restitution under the equitable theory of quantum meruit (*see Farash v Sykes Datatronics, Inc.*, 59 NY2d 500, 506 [1983] [explaining that if "what the plaintiff has done is part of the agreed exchange, it is deemed to be received by the defendant"] [internal quotation marks omitted]; *see also Sivin-Tobin Assoc., LLC v Akin Gump Strauss Hauer & Feld LLP*, 68 AD3d 616, 617 [1st Dept 2009] [to establish an implied contract to pay for services, "the plaintiff usually must prove that the services were performed and accepted with the understanding on *both* sides that there was a fee obligation"]).

Second, Dragonetti's argument that it reasonably expected compensation from Verizon is unavailing both because it is based on the assertion — rejected above — that Verizon had a

common law obligation to perform or pay for the work and because the Parks Department Contracts deferred *to Verizon's* discretion to determine what "precautions," if any, were necessary (Parks Department Contracts, Part I-D, Article 15; *see also American-European Art Assoc., Inc. v Trend Galleries, Inc.*, 227 AD2d 170, 171 [1st Dept 1996] [affirming dismissal of quantum meruit claim where plaintiffs "failed to plead any reasonable expectation of being compensated"]).

In sum, Verizon neither told Dragonetti to perform any work relating to its wires, nor agreed to pay for any work. Verizon cannot have "accepted" work that it in fact rejected simply because Dragonetti went ahead with the work on its own. Likewise, Dragonetti cannot have reasonably expected compensation for work not identified in the Parks Department Contracts, that the City did not order or require from Verizon, and that Verizon expressly disclaimed.

Account Stated

Next, and for similar reasons, Dragonetti's account stated claim must be dismissed. An account stated is an express or implied agreement between parties "to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007] [internal quotation marks omitted]; *see also Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995] [explaining that an account stated "is an account, balanced and rendered, with an assent to the balance either express or implied"]). "To prevail on a cause of action for an account stated, the plaintiff must show invoices, receipt by defendant, and lack of objection by defendant for a substantial period of time" (*Atrium Staffing, LLC v Iridium Dev. Inc.*, 57 Misc 3d 1224(A), 2017 NY Slip Op 51654(U), *2 [Sup Ct, NY County 2017] [internal quotation marks omitted]). However, an account stated "assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated"—i.e., an account stated "cannot be used to create liability where none otherwise exists" (*Ryan Graphics*, 39 AD3d at 251 [internal quotation marks omitted]).

Dragonetti's account stated claim fails for several reasons. As an initial matter, there is no underlying contractual or business relationship between Dragonetti and Verizon with respect to the Parks Department Contracts (or any express agreement where Verizon obligated

itself to pay Dragonetti for the work at issue) (*see Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 155-56 [1975] [finding that "the plaintiff's assertions do not provide a basis for concluding that it has made out a prima facie case since there is no written instrument by which the defendant has expressly obligated itself to make the payments required by the accounts stated"]). Nor were there any prior transactions between Dragonetti and Verizon with respect to any work relating to the Parks Department Contracts that would support the type of relationship warranting an account stated claim (*see Ryan Graphics*, 39 AD3d at 250-51).

Further, there was no implied agreement between Dragonetti and Verizon to treat the invoices as a balance due. As noted above, the Complaint states that Verizon "failed and refused to acknowledge" its alleged obligation to pay Dragonetti for the purported "utility impact/interference work performed" (Compl. ¶ 19). And Dragonetti admits that Verizon made "a blanket claim that support/protection concerning its lines was not necessary" (Dragonetti aff ¶ 6). Verizon therefore made clear—prior to this litigation—that it was not going to pay Dragonetti for any work relating to Verizon's telephone lines. Because there was a dispute about the alleged account there can be no claim for an account stated (*Abbott, Duncan & Wiener*, 214 AD2d at 413 ["There can be no account stated . . . where any dispute about the account is shown to have existed"]).

Dragonetti recognizes that an account stated claim "cannot be used to create liability where none otherwise exists" (*Ryan Graphics*, 39 AD3d at 251) but argues nevertheless that Verizon is liable for the costs of the work at issue by virtue of its common law obligation to move or protect interfering facilities. As discussed above, this argument is meritless because Verizon had no common law obligation to undertake that work.

Also unpersuasive is Dragonetti's assertion that Verizon acquiesced to the invoices because it only "generally" objected to paying Dragonetti but never objected to specific invoices. The cases cited by Dragonetti in support of this argument are inapposite and in no way indicate that Verizon's wholesale rejection of any and all work to be performed by Dragonetti on Verizon's equipment was somehow an ineffective way to dispute the invoices (*see e.g. Shea & Gould v Burr*, 194 AD2d 369, 371 [1st Dept 1993] [failure to object to bill for five months sufficed to give rise to an account stated, especially in view of partial payment made, and defendants' conclusory allegations of oral objection to account was insufficient to rebut inference of implied agreement to pay]; *Liddle, O'Connor, Finkelstein &*

Robinson v Koppelman, 215 AD2d 204, 204 [1st Dept 1995] ["Plaintiff established an 'account stated' for legal services rendered on behalf of defendant in light of the fact that the parties executed a written retainer agreement enumerating the fees, plaintiff performed the services, and defendant made substantial payments"]; *cf. Ryan Graphics*, 39 AD3d at 251 ["Given [defendant's] denial of a business relationship with plaintiff, its failure specifically to dispute the individual invoices . . . is of no import"]).

In short, Dragonetti cannot state a viable claim for an account stated simply by relying on unsolicited invoices it sent to Verizon for work already disapproved by Verizon (*see Interman*, 37 NY2d at 153-54 ["the very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness . . . so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained"] [internal quotation marks omitted]).

[*9]Unjust Enrichment

Finally, Dragonetti's unjust enrichment claim must also be dismissed. To prevail on a claim for unjust enrichment, the plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks omitted]). Although privity is not required for an unjust enrichment claim, "a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011]). Moreover, "an unjust enrichment claim can only be sustained if the services were performed at the defendant's behest" (*id.*; *see also Soldiers', Sailors', Marines' & Airmen's Club, Inc. v Carlton Regency Corp.*, 30 Misc 3d 352, 363 [Sup Ct, NY County 2010] [to recover from a particular defendant on an unjust enrichment claim, plaintiff must show that it rendered services for that defendant at that defendant's behest; it is not enough that the defendant may have indirectly benefitted from the services], citing *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [1st Dept 2002]).

Dragonetti asserts that the requisite "connection" between the parties exists because Dragonetti encountered Verizon's private overhead facilities while performing its tree pruning

work for the City. This is not a sufficient connection or relationship between Dragonetti and Verizon to have caused reliance on Dragonetti's part. Instead, the clear terms of the Parks Department Contracts empowered Verizon to decide what protection work was necessary, and Dragonetti's own allegations and admissions acknowledge that Verizon consistently took the position that no protection work was necessary. For the same reasons, whatever work Dragonetti performed relating to Verizon's wires was plainly not at Verizon's "behest."

Moreover, it is not "against equity and good conscience" to permit Verizon to avoid paying for work that it made clear *in advance* that it did not think was necessary.

****

The Court has considered Dragonetti's remaining arguments and finds them unavailing.

Accordingly, it is:

ORDERED that Defendant's motion to dismiss the Complaint is **GRANTED**; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the Complaint.

This constitutes the Decision and Order of the Court.

4/28/2021SIG

JOEL M. COHEN, J.S.C.

Footnotes

Footnote 1:*See Matter of Deering*, 93 NY 361, 362 (1883) ("although authorized to lay its pipes through the public streets . . . the company took the risk of their location and should be

required to make such changes as public convenience or security requires, and at its own cost and charge").

Footnote 2: The plaintiff in *Perfetto* also relied on provisions of the New York City Administrative Code not applicable here—namely Section 19-143, which, as discussed above, codifies a utility's common law protection/removal obligations in connection with street repairs.

Return to Decision List