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Universal Eng'g Servs., P.C. v Industrial Dev. Agency of Mount Vernon, N.Y.
2020 NY Slip Op 51066(U)
Decided on September 22, 2020
Supreme Court, Westchester County
Walsh, J.
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Decided on September 22, 2020

Supreme Court, Westchester County

Universal Engineering Services, P.C., Plaintiff,

against

**Industrial Development Agency of Mount Vernon, New York and
City of Mount Vernon, New York, Defendants.**

69254/2019

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Gretchen Walsh, J.

The e-filed documents listed in NYSCEF by Documents Numbers 27-48 were read on this motion by Defendants Industrial Development Agency of Mount Vernon, New York (the "MVIDA") and the City of Mount Vernon, New York (the "City," "Mount Vernon," or "Mt. Vernon") (collectively "Defendants") for an Order pursuant to CPLR 3211(a)(7) dismissing the Amended Complaint of Plaintiff Universal Engineering Services, P.C.'s ("Plaintiff" or "Universal"). Plaintiff opposes the motion.

PLAINTIFF'S ALLEGATIONS IN THE AMENDED COMPLAINT

In its Amended Complaint, Plaintiff alleges that it is a professional corporation [*2]authorized to do business in New York, MVIDA is a public benefit corporation authorized by the New York State Industrial Development Agency Act (General Municipal Law ["GML"] §§ 850-888) and GML § 902-c, and Mount Vernon is a municipal corporation of the State of New York (Amended Complaint at ¶¶ 1-3). Plaintiff contends that MVIDA is a "component unit" of the City, which at all pertinent times, was controlled by the City's Mayor (*id.* at ¶ 4). According to Plaintiff, as reflected in the 2017 audited financial statements of MVIDA, which were reviewed and approved by the City:

The Agency is considered a component unit of the financial reporting entity known as the City of Mount Vernon, New York. Inclusion in the financial reporting entity, City of Mount Vernon, New York (the "City"), is determined based on financial accountability as defined by GASB Statement No. 14, as amended, "The Financial Reporting Entity". Component units are legally separate entities for which the City of Mount Vernon, New York, is financially accountable. The Agency is considered a proprietary fund (*id.* at ¶ 5).

Plaintiff states that during the period beginning on November 6, 2016 and continuing through July 8, 2019, MVIDA's Chairman, Richard Thomas, was also the City's Mayor (*id.* at ¶ 6).

Plaintiff alleges that, on or about November 7, 2016, it was contracted by Defendants to "perform oversight and development of quality management systems to meet Mount Vernon's goals for economic growth and opportunity" (the "Agreement") (*id.* at ¶ 7, Ex. A). Specific items included in Plaintiff's scope of work were to "[m]anage the Building Department" and

to "[d]irect the inspection program of buildings under construction and accessory structures with [*sic*] the City limits for conformance to required codes and ordinances" (*id.*).

Plaintiff further alleges that, on or about November 30, 2016, the Agreement was amended and extended by virtue of an amendment (the "Amended Agreement") (*id.* at ¶ 8, Ex. B). According to Plaintiff, included in the scope of duties to be performed under the Agreement and the Amended Agreement were to "[a]ssist the [MVIDA] in review of plans and drawings submitted to the agency and/or any department of the City," and to "[s]ubmit to the [MVIDA] and/or any department of [the City] recommendations for objections, conclusions and approval of said plans and drawings, including using the official forms if requested" (*id.* at ¶ 9).

Plaintiff contends that, pursuant to the Agreements, under general direction from the City's Mayor's Office, and under the supervision and direction of the City's Commissioner of Buildings and the City's Commissioner of Public Works, Plaintiff assisted the Department of Buildings and Department of Public Works to perform the various services set forth therein, providing substantial benefits to the City. Plaintiff further contends that the City, through its Mayor and MVIDA Chairman, and its Building Department, was fully aware of the benefits thus conferred by the work of Plaintiff (*id.* at ¶ 10).

According to Plaintiff, at all material times, it was an approved Special Inspection and Code Consultation Agency for the City based on relevant experience, sufficient staffing and professional engineering licensure and that this approval was confirmed in a letter from Curtis J. Woods, P.E., the City's Buildings Commissioner to Plaintiff, dated May 18, 2017 (*id.* at ¶ 11, Ex. C). Plaintiff alleges that, in connection with the services provided under the Agreement and Amended Agreement, Plaintiff was to be compensated in the amount of \$150.00 per hour (*id.* at ¶ 12). Plaintiff contends that: (1) it tendered monthly invoices and reports to MVIDA in compliance with the Agreement and Amended Agreement; (2) the invoices and reports were received by MVIDA and were known to exist by the City; and (3) neither Defendant disputed or rejected any of the invoices or reports issued by Plaintiff (*id.* at ¶¶ 13-14).

Plaintiff further contends that the monies paid over the years to Plaintiff were included within the audited financial statements of MVIDA, which were reviewed and approved by the City (*id.* at ¶ 15). It states that the audited financial statement of MVIDA, approved by the City "had this to say about the integral role of consultants such as Plaintiff:"

In 2017, the Mount Vernon Industrial Development Agency (MVIDA) played a critical role in the financial prosperity and health of the city. In a year when the city's budget was starved by political infighting, the Agency provided a harbor for economic stability and growth. Things got so bad that the Mayor had to go to court, and in June of 2017 he obtained an injunction ordering the City Council and Comptroller from "disrupting, obstructing or interfering" with salaries and the provision of municipal services. During the legal wrangling, some departments did not have enough money to operate.

In the case of the Buildings Department, the Agency was able to lend assistance. In its role of promoting and safeguarding the economic wellbeing of Mount Vernon, MVIDA consultants teamed up with the Buildings Department to perform inspections and issue permits. As result of the partnership, Building Department revenues bounced back from \$800,000 in 2016 to \$1.1 million in 2017. Even more important, clearing the backlog in plan reviews and inspections allowed more than \$380 million in capital investment to go forward - \$292.7 million in projects approved by the MVIDA and \$90 million for 42 Broad Street, a non-MVIDA luxury rental development.

(*id.* at ¶ 16).

Plaintiff alleges that Defendants continued to request services pursuant to the Agreement and Amended Agreement, and Plaintiff continued to perform them, until early October 2019, when Plaintiff received a letter dated October 4, 2019 from the City's Buildings Commissioner, Kindra C. Dolman, stating, "as of today, October 4th, 2019, the City of Mount Vernon Department of Buildings is canceling Universal Engineering Services (UES), as a consultant" (*id.* at ¶ 17, Ex. D). Plaintiff argues that "[t]his letter itself acknowledged the obligations of [the City] to pay Plaintiff for its services under the Agreement and Amended Agreement, and the fact that Plaintiff's contracts had been duly and lawfully approved by [the City]" (*id.* at ¶ 18).

Plaintiff contends that it billed a total of \$1,492,468.26 to Defendants between October of 2016 and October of 2019 for services performed as per the terms of the Agreements and that Defendants MVIDA and/or the City paid Plaintiff a total of \$849,976.22 for its services between December 2016 and June 2019 (*id.* at ¶ 19). Plaintiff alleges that, therefore, "[t]here remains a total balance of \$642,484 due to Plaintiff, in accordance with its Agreements and which is the reasonable value of the work it performed and for which it has not been paid" (*id.* at ¶ 20). Plaintiff further alleges that, despite due demand by Plaintiff for payment on such invoices, Defendants have failed and refused to pay Plaintiff for services performed in

accordance with the terms and conditions of the Agreement and Amended Agreement, and that, to date, the total outstanding balance due and owing to Plaintiff by Defendants is \$642,484.04, excluding statutory interest.

Plaintiff asserts seven causes of action (the first four against MVIDA, and the next three against the City). For its First Cause of Action for breach of contract against MVIDA, Plaintiff alleges that it "has duly performed all of the services required to be performed by it under the Agreement and Amended Agreement with Defendant, [MVIDA]" but that, "[d]espite due demand, Defendant [MVIDA] has failed and refused to make payment to Plaintiff for the balance due and owing for services rendered by Plaintiff" (*id.* at ¶¶ 23-27). In its Second Cause [*3] of Action, Plaintiff alleges that MVIDA was unjustly enriched in that "Plaintiff furnished services to Defendant under circumstances in which Plaintiff reasonably expected payment, those services were accepted by Defendant, and a benefit was therefore conferred upon Defendant" and that, "[a]s a result of Defendant's failure and refusal to make payment to Plaintiff for the balance due and owing on the Agreement and Amended Agreement, Defendant has been unjustly enriched, while Plaintiff has been damaged" (*id.* at ¶¶ 28-30). For its Third Cause of Action, Plaintiff brings a claim for *quantum meruit* against MVIDA alleging that Plaintiff "performed the services rendered to Defendant in good faith, and such services were accepted by Defendant, that "Plaintiff had a reasonable expectation of being compensated for such services" and that the "reasonable value of the services rendered by Plaintiff to Defendant is a sum of not less than \$642,484.04" (*id.* at ¶¶ 31-34). Plaintiff's Fourth Cause of Action is for account stated against MVIDA based on its allegations that it "is due and owing to Plaintiff from Defendant the amount of \$642,484.04 on an account stated, which has been previously demanded in the form of invoices, statements and correspondence to Defendant informing Defendant of said obligation, which demands were received by Defendant and were never objected to on any ground" and that "Defendant has failed to pay Plaintiff the amount due and owing despite payment having been duly demanded by Plaintiff" (*id.* at ¶¶ 35-37).

For its Fifth Cause of Action for breach of contract against the City, Plaintiff alleges that the "Agreement and Amended Agreement were duly authorized and entered into on behalf of Mt. Vernon," that Plaintiff has duly performed all of the services required to be performed by it under the Agreement and Amended Agreement with Defendants" and that "[d]espite due demand, Defendant Mt. Vernon has failed and refused to make payment to Plaintiff for the balance due and owing for services rendered by Plaintiff" (*id.* at ¶¶ 38-43). Plaintiff's Sixth

Cause of Action for *quantum meruit* against the City alleges that "Plaintiff performed the services rendered to Defendant in good faith, and such services were accepted by Defendant Mt. Vernon" and that the "reasonable value of the services rendered by Plaintiff to Defendant Mt. Vernon is a sum of not less than \$642,484.04" (*id.* at ¶¶ 44-46). Plaintiff's Seventh Cause of Action is a claim of unjust enrichment against the City, which is based on allegations that "Plaintiff had a reasonable expectation of being compensated for such services by Mt. Vernon" and that the "reasonable value of the services rendered by Plaintiff to Defendant Mt. Vernon is a sum of not less than \$642,484.04" (*id.* at ¶¶ 47-49).

DEFENDANTS' MOTION TO DISMISS

A. Defendants' Contentions in Support of Their Motion to Dismiss

In support of their motion, Defendants submit an affirmation of counsel, Darious P. Chafizdeh, Esq., dated June 1, 2020, together with its exhibits, and a memorandum of law ("Defs' Mem.")

The essence of Defendants' motion is that CPLR 3211(a)(7) requires dismissal of the Amended Complaint for failure to state claims against MVIDA because the Agreement and Amended Agreement are outside MVIDA's statutory powers and purpose and, therefore, they are illegal, unable to be ratified, and Plaintiff cannot recover under any quasi contract claim (Defs' Mem. at 7-13). Defendants also contend that the City is not a party to the Agreements and that Richard Thomas, the City's Mayor and Chairperson of MVIDA at the time of execution, had no authority to execute contracts for city services (*id.* at 14-20).

Defendants state that MVIDA and the City are separate legal entities organized and operated pursuant to separate governing schemes: MVIDA is a public benefit corporation [*4]overseen by a Board of Directors and governed by statute, with specific powers tied to its statutory purpose and the City is a municipality overseen by an elected City Council and governed by a city charter that, *inter alia*, identifies the duties of municipal officials and establishes processes for the appropriation of municipal funds. Defendants argue that Plaintiff purports to have executed two agreements with MVIDA in November 2016 on the basis of which it asserts claims against both MVIDA and the City, but that each agreement violates the enabling statute (GML §§ 850-888) because the Agreements "contemplate the MVIDA will pay Universal to provide City services to the City that are completely unrelated to, and

outside the permissible scope of, the MVIDA's function and enumerated powers," which is impermissible as a matter of law (*id.* at 1). Relying on the language of the first Agreement, Defendants argue that the 13 work items listed with regard to the Department of Buildings and the 11 work items listed with regard to the Department of Public Works (although coined as providing services for MVIDA) "make[] plain that Universal was expected to take over and run each of these City departments" (*id.* at 4). Defendants then quote the language regarding the services to be provided by Universal to both MVIDA and "any department of the City of Mount Vernon" from the Amended Agreement (*i.e.*, professional drawing and plan review services) (*id.*). According to Defendants, "[w]hile the Amended Complaint attempts to bring the Agreements within the MVIDA's statutory mandate by alleging they promote economic development, the allegations are controverted by the terms of the Agreements themselves, statutory law and established precedent" (*id.* at 7).

Defendants contend that Plaintiff's claims for unjust enrichment and *quantum meruit* against the City "are not available against a municipality where an unenforceable contract arises from the violation of a fundamental public policy or a restriction on the municipality's power" (*id.* at 20-22). According to Defendants, the "mere acceptance of benefits does not estop a municipal corporation from denying liability for services rendered, where a contract was neither validly entered into nor ratified" (*id.* at 20-21).

Regarding the insufficiency of Plaintiff's claims against the City, Defendants point out that "the City did not execute the agreements and the City Council did not authorize these agreements" and MVIDA "circumvented the City's processes for appropriating City funds" (Defs' Mem. at 1-2). In support, Defendants assert

the City Charter did not permit the Mayor to contract to appropriate city funds for these purposes and, were the City to be held liable, that determination would be in derogation of multiple City Charter provisions regarding the appropriation process as well as public policy. The City Charter provides that there may not be any appropriations of money for any purpose except through the passage of an ordinance or resolution approving same by the City Council [*citing* Mount Vernon City Charter §46] The Charter also provides the passage of an ordinance requires "the affirmative vote of at least a majority of all members of the City Council," and, on its passage, "the yeas and nays of the members voting thereon shall be entered in full on the journal" [*citing* Mount Vernon City Charter §37] Moreover, under the Charter, the City's Board of Estimate and Contract is required to approve all contracts [*citing* Mount Vernon City Charter § 73] The Amended Complaint does

not and cannot allege that the Agreements were entered into in conformity with these City Charter provisions (*id.* at 18-19).

Therefore, Defendants argue that the lack of City Council authorization to approve these agreements or fund any work performed by MVIDA requires dismissal of the Amended [*5] Complaint as a matter of law against the City.

Defendants contend that MVIDA was not enriched so as to enable Plaintiff to recover on quasi-contractual and/or equitable theories of recovery and that the City cannot be bound by a "City official's *ultra-vires* commitments, because New York's public policy requires a party that contracts with a municipality to confirm the authority of the city official to act" (*id.* at 2). Defendants contend that Plaintiff "assumed the risk of loss when it failed to identify, or chose to ignore, that the former Mayor was not authorized to bypass City processes and execute these agreements purportedly on behalf of the MVIDA" (*id.*). Finally, Defendants request that the Amended Complaint be dismissed in its entirety for failure to state a claim, without leave to replead, because Plaintiff was already afforded the opportunity to amend.

B. Plaintiff's Contentions in Opposition

In opposition to Defendants' motion, Plaintiff submits an affirmation of its counsel, Kevin O'Connor, Esq., dated June 19, 2020, together with exhibits and a memorandum of law in opposition ("Plf's Opp. Mem.").

In short, Plaintiff contends that Defendants' motion fails because it had a valid contract with MVIDA to provide consulting services to the City's Buildings and Public Works Departments so that the City would be able to process applications for projects that would contribute to the City's economic development (Plf's Opp. Mem. at 9-14). It argues that the facts pleaded in the Amended Complaint demonstrate that in the event there is no contract with either MVIDA or the City, Plaintiff has valid causes of action in *quantum meruit* and unjust enrichment (*id.* at 14-19). Plaintiff also contends that it has stated a valid cause of action for account stated (*id.* at 19-20).

Plaintiff argues that, as set forth in its Amended Complaint, the action arises out of two successive contracts between itself, a professional engineering firm, and MVIDA, a public benefit corporation established under GML §§ 850-888, which gave MVIDA substantial

power to "promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing industrial, manufacturing, warehousing, commercial, research and recreation facilities. . . and thereby advance the job opportunities, health, general prosperity and economic welfare of the people [of the City]" (*id.* at 1, *citing* GML § 858)). Under that section, Plaintiff contends, MVIDA was given not only the above enumerated powers, but also the power "to do all things necessary and convenient to carry out its purposes" (*id.* at 1, *citing* GML § 858(17)).

According to Plaintiff, on November 7, 2016, MVIDA entered into an agreement with it which, in order for MVIDA to be able to obtain approval for its pending projects, tasked Plaintiff with improving the operations of the City's Buildings Department and Public Works Department. Plaintiff contends that "[MVIDA] tasked Universal with formulating policies for [MVIDA's] operations and for hiring and training personnel, and while doing so, managing and performing building code inspections, design reviews, and building code enforcement" in "furtherance of the [MVIDA's] desire to obtain approval for construction of projects which were then pending" (*id.* at 2). Plaintiff states that the Agreement containing these provisions was signed on behalf of MVIDA by its Chairman and the City's then Mayor, Richard Thomas (*id.*). Plaintiff states that MVIDA entered into a second agreement with Universal on November 30, 2016, which "elaborated on the tasks set forth in the first contract, providing for Plaintiff to 'assist [MVIDA] and/or any municipal agency' in reviewing plans and drawings for compliance with applicable statutes and regulations, and providing recommendations and conclusions thereon" (*id.*) "This [*6] agreement was also signed by Mayor Thomas, Chairman of the [MVIDA]" (*id.*).

Plaintiff argues that "for the greater part of the next two years, Plaintiff performed the services as provided in the two agreements, billing [MVIDA] for its services" and that the work performed by Universal contributed directly to the work of MVIDA and therefore accomplished things "necessary to carry out [MVIDA's] purpose," because "properly functioning Building and Public Works departments were needed in order to advance the goal of [MVIDA] to obtain approval for pending projects" (*id.*). Plaintiff cites to a December, 2017 audited Financial Statement of MVIDA, in which the auditors stated, "'clearing the backlog in plan reviews and inspections allowed more than \$380 million in capital investment to go forward [including] \$292.7 million in in projects approved by the MVIDA, in a year when the city's budget was starved by political infighting,' and thus 'MVIDA played a critical role in the financial prosperity and the health of the city'" (*id.* at 2-3). Plaintiff argues that the "

[MVIDA] was fully empowered under GML § 858 to enter into a contract with Plaintiff to facilitate the approval of major projects it was endeavoring to progress by assisting the Building and Public Works departments to work more efficiently and thus move the projects forward" and that the work performed by Plaintiff succeeded in achieving that goal (*id.* at 3). For these reasons, Plaintiff contends, it has asserted a valid cause of action for breach of contract.

Plaintiff asserts that, even assuming that there was not a valid contract for that work, it is "clear that [MVIDA] had sufficient authority to enter into such a contract; it was not violative of public policy for [MVIDA] to have that work performed; and the [MVIDA] and/or City of Mount Vernon would be unjustly enriched if they were to be permitted to keep the benefits conferred upon them without paying Plaintiff in full for the work that conferred those benefits" and, therefore, Plaintiff has asserted valid causes of action for *quantum meruit* and unjust enrichment (*id.*). Finally, Plaintiff contends that MVIDA "received Plaintiff's invoices for the work it performed and at least one statement for the balance due, and never objected to either the invoices or the statement. The invoices, having not been objected to, together with the statement, constitute an account stated, to which [MVIDA] has acquiesced, and thus Plaintiff has asserted a valid cause of action upon an account stated" (*id.*)

With respect to Plaintiff's claims against the City, Plaintiff contends that it is "indisputable that the latter's former Mayor, Richard Thomas, was fully knowledgeable of, and indeed favored, Plaintiff's contract with [MVIDA], since he signed the contract on behalf of [MVIDA]" and that "[t]he City accepted the benefits of Universal's services for a period of over two years, apparently without any objection, at least insofar as [MVIDA] or Mount Vernon have documented thus far" (*id.* at 3-4). Thus, Plaintiff argues, "if its Building Department lacked the engineering skill and knowledge or personnel or infrastructure required to perform the work involved in reviewing permit applications, plans and drawings and vetting them for approval," it was permitted to request that Plaintiff perform such work, and "although a city or town generally cannot be held liable in unjust enrichment or *quantum meruit*, there is an exception to this rule that allows for recovery where the services accepted by the municipality are an appropriate item for an express contract and within the contractual power of the municipality" (*id.* at 4). For these reasons, Plaintiff argues that Defendants' motion to dismiss should be denied (*id.*).

C. Defendants' Contentions in Reply

In further support of their motion, Defendants submit a reply memorandum of law (Defs' Reply). In it, Defendants reiterate their argument that Plaintiff "entered into invalid 'agreements' with the former Mayor of Mount Vernon while the Mayor purported to act in the name of the [*7][MVIDA]" (Defs' Reply at 1). Defendants contend that the "agreements" contracted for city services outside the scope of permissible activities for MVIDA and that, while those city services would have been permissible activities for the City, they were executed in violation of "explicit City Charter provisions for contracting with the City" (*id.*). Therefore, Defendants argue that the agreements are "neither permissible for an IDA nor compliant with the City Charter as required for a City contract—requiring dismissal of the Amended Complaint as a matter of law" (*id.*).

Regarding Plaintiff's claims against the City, Defendants contend that Plaintiff "abandons any argument that the City is liable in contract" (*id.*) With respect to MVIDA, Defendants contend that Plaintiff "does not even try to argue the agreements concern qualified 'projects' for an IDA, defined as 'any land, any building or other improvement . . . which shall be suitable for manufacturing, warehousing, research, commercial or industrial purposes'" (*id.* at 1-2). Defendants also argue that Plaintiff does not "dispute that the statutory function of an IDA is to foster economic development by assisting eligible businesses to develop 'projects' that will create job opportunities" but instead "advances a multi-step theory that (a) the MVIDA requires properly functioning City departments in order to fulfill its mission; (b) the MVIDA is authorized to enter into contracts that are necessary or convenient for it to achieve its mission; (c) Universal's services assisted the City departments to properly function; and (d) therefore it was permissible for the MVIDA to contract with Universal to assist the City departments to enable the City departments to assist the MVIDA in accomplishing its mission" (*id.* at 2). Defendants argue that the law is clear that, "by its limited statutory authority, the MVIDA (or any IDA) is not a staffing agency for the City" and that "[a]ny change in an IDA's statutory powers must be accomplished via the legislature and not the courts" (*id.*).

Finally, Defendants argue that Plaintiff "cannot rely on boilerplate language to support its claims in quasi-contract, because Universal ignores the key issue and controlling case law," which it contends is that the Agreements were made without any authority because they are outside the scope of MVIDA's statutory function, and they were executed in violation of the City Charter (*id.*). Therefore, Defendants argue, that agreements are illegal and

unenforceable, and Plaintiff's claims for *quantum meruit*, unjust enrichment, and account stated should be dismissed.

STANDARD OF REVIEW

Defendants seek to dismiss all causes of action in the Amended Complaint pursuant to CPLR 3211(a)(7).

The legal standards to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Props. Assoc.*, 242 AD2d 359 [2d Dept 1997], *citing Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper*, 242 AD2d at 360). The court's function is to "accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts" (*Cooper*, 242 AD2d at 360, *quoting 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 W. 232nd Owners Corp.*, 98 NY2d at 152).

Where the plaintiff submits evidentiary material, the Court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leon v Martinez*, 84 NY2d 83 [1994]; [Simmons v Edelstein](#), 32 AD3d 464 [2d Dept 2006]; [Hartman v Morganstern](#), 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]). On the other hand, a plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint ([Kempf v Magida](#), 37 AD3d 763 [2d Dept 2007]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]).

Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined in order to determine whether there is evidentiary support for the pleading (*Rovello*, 40 NY2d 633; *Pace v Perk*, 81 AD2d 444, 449-50 [2d Dept 1981]; *Kempf*, 37 AD3d 763; [Tsimerman v Janoff](#), 40 AD3d 242 [1st Dept 2007]). Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action ([Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.](#), 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.*, 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis*, 95 AD2d 822 [2d Dept 1983]).

In construing an unambiguous contract, "the intention may be gathered from the four corners of the instrument and should be enforced according to its terms" ([Beal Sav. Bank v Sommer](#), 8 NY3d 318, 324 [2007]). A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 570 [2002]). Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous ([Innophos, Inc. v Rhodia, S.A.](#), 38 AD3d 368, 369 [1st Dept 2007], *affd* 10 NY3d 25 [2008]). "On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact and summary judgment should be denied" (*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1990], *lv denied* 77 NY2d 807 [1991]). "Where consideration of a contract as a whole resolves an ambiguity created by one clause, there is no occasion to consider extrinsic evidence of the parties' intent" (*Hudson-Port Ewen Assoc., L.P. v Kuo*, 78 NY2d 944, 945 [1991]).

DISCUSSION

A. Plaintiff's Amended Complaint Fails to State Valid Claims Against the City

The elements necessary to plead a breach of contract cause of action are "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" ([Tri-Star Lighting Corp. v Goldstein](#), 151 AD3d 1102, 1105 [2d Dept 2017], *quoting* [Dee v Rakower](#), 112 AD3d 204, 208 [2d Dept 2013]).

Here, the Agreement and Amended Agreement annexed to the Amended Complaint clearly show that MVIDA was the counterparty to the Agreements because they were signed by Mayor Richard Thomas in his capacity as MVIDA's Chairperson, and not in his capacity as the City's Mayor. As such, there is no basis to hold the City liable for Plaintiff's breach of contract cause of action as it was not a party to the contract (*Randall's Is. Aquatic Leisure, LLC v City of* [*8] NY, 92 AD3d 463 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]; *Pacific Carlton Dev. Corp. v 752 Pacific, LLC*, 62 AD3d 677 [2d Dept 2009]; *HDR, Inc. v International Aircraft Parts, Inc.*, 257 AD2d 603 [2d Dept 1999]; *National Survival Game of NY, Inc. v NSG of LI Corp.*, 169 AD2d 760 [2d Dept 1991]). "An industrial development agency 'has a separate legal identity from the municipalities that it serves" (*Matter of Maragos v Town of Hempstead Indus. Dev. Agency*, 174 AD3d 611, 614 [2d Dept 2019], *lv denied* 35 NY3d 902 [2020]). Plaintiff's allegation that MVIDA is a component unit of the City (which, at all pertinent times, was controlled by the Mayor) for which the City was financially accountable (Amended Complaint at ¶¶ 4-5) is insufficient to render the City a counterparty to the Agreements.

But even if Thomas had signed in his capacity as the City's Mayor, Plaintiff's breach of contract claim would not survive as Plaintiff has failed to allege an enforceable contract against the City. The law is well settled that "[a] municipal contract which does not comply with statutory requirements or local law is invalid and unenforceable" (*Mans Constr. Oversight, Ltd. v City of Peekskill*, 114 AD3d 911, 911 [2d Dept 2014], *quoting Infrastructure Mgt. Sys., LLC v County of Nassau*, 2 AD3d 784, 786 [2d Dept 2003]). "A party contracting with a municipality is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them" (*Mans Constr. Oversight, Ltd.*, 114 AD3d at 912). In support of their motion, Defendants contend that for a contract entered into by the City to be valid and enforceable, it must comply with various sections of the City's Charter, namely: (1) Section 46, which requires that there may not be any appropriation of money without the passage of an ordinance or resolution approved by a majority of the members of the City Council; and (2) Section 73, which requires the approval of the contract by the City Board of Estimate. Plaintiff's Amended Complaint fails to allege compliance with these requirements. Furthermore, in opposition to Defendants' motion, Plaintiff fails to refute the City's noncompliance with these requirements. As such, because Plaintiff's Amended Complaint fails to allege compliance with the City's Charter with regard to the City's purported entry into these agreements, [FN1] the branch of Defendants' motion seeking to dismiss Plaintiff's Fifth Cause of Action for breach of contract against the City shall be granted.

And for the same reasons, Plaintiff's quasi contract claims against the City fare no better. "[T]here cannot be a valid implied contract with a municipality when the Legislature has assigned the authority to enter into contracts to a specific municipal officer or body or has prescribed the manner in which the contract must be approved, and there is no proof that the statutory requirements have been satisfied" (*Mid-Atlantic Perfusion Assoc.*, 54 AD3d at 832, [*quoting Matter of Pache v Aviation Volunteer Fire Co.*, 20 AD3d 731](#), 732-33 [3d Dept 2005] *lv* [*9] *denied* 6 NY3d 705 [2006]). [\[FN2\]](#) As noted by the Second Department in *Mid-Atlantic*:

Mere acceptance of benefits does not estop a municipal corporation from denying liability for services rendered, where a contract was neither validly entered into nor ratified. "The result may seem unjust but any other rule would completely frustrate statutes designed to protect the public from government misconduct or improvidence. The contractor's option is to withhold his services unless an agreement is executed and approved as the statutes require" (*Mid-Atlantic Perfusion Assoc.*, 54 AD3d at 832, *quoting Parsa v State of NY*, 64 NY2d 143, 147 [1984]).

Here, while certain letters and audited financial statements attached to Plaintiff's Amended Complaint support that the City agreed to have Plaintiff perform services for its Buildings and Public Works Departments, and that Plaintiff dutifully performed such services, such evidence is nevertheless insufficient to establish an implied contract with the City. As pronounced by the New York Court of Appeals, "[e]ven though a promise to pay may be spelled out from the parties' conduct, a contract between them may not be implied to provide 'rough justice' and fasten liability when applicable statutes expressly prohibit it" (*Parsa*, 64 NY2d at 147). Plaintiff has failed to sufficiently plead facts that would support the narrow exception to these rules set forth by the Fourth Department in *Vrooman v Village of Middletown* (91 AD2d 833 [4th Dept 1982] *lv denied* 68 NY2d 610 [1983]) (*see Mans Constr. Oversight, supra*; *Mid-Atlantic Perfusion Assoc., supra*; *Michael R. Gianatasio, PE, P.C. v City of NY*, 53 Misc 3d 757 [Sup Ct, NY County 2016], *affd* 159 AD3d 659 [1st Dept 2018]). Accordingly, the branches of Defendants' motion seeking the dismissal of Plaintiff's Sixth and Seventh Causes of Action shall be granted.

B. Plaintiff Has Asserted Valid Contract and Quasi Contract Causes of Action Against MVIDA

GML § 902-c provides that MVIDA:

is hereby established for the accomplishment of any or all of the purposes specified in title one of article eighteen-A of this chapter . It shall have the powers and duties now or hereafter conferred by title one of article eighteen-A of this chapter upon industrial development agencies, except that the agency's power of condemnation shall not be exercised without prior approval of the city council of the city, and provided that the exercise of the powers by such agency with respect to the acquisition of real property, whether by purchase, condemnation, or otherwise, shall be limited to the local corporate limits of the city of Mount Vernon

Article 18A of the GML, Section 852 describes the policy of the State in creating Industrial Development Agencies as:

to promote the economic welfare, recreation opportunities and prosperity of its inhabitants and to actively promote, attract, encourage and develop recreation, economically sound commerce and industry and economically sound projects through [*10]governmental action for the purpose of preventing unemployment and economic deterioration by the creation of industrial development agencies which are hereby declared to be governmental agencies and instrumentalities and to grant to such industrial development agencies the rights and powers provided in this article.

With respect to the purposes of IDAs, GML § 858 provides:

The purposes of the agency shall be to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing industrial, manufacturing, warehousing, commercial, research and recreation facilities including industrial pollution control facilities, educational or cultural facilities, railroad facilities, horse racing facilities, automobile racing facilities and continuing care retirement communities and thereby advance the job opportunities, health, general prosperity and economic welfare of the people of the state of New York and to improve their recreation opportunities, prosperity and standard of living

Under GML § 858, to accomplish these goals, IDAs are given 17 enumerated powers, which include the power:

(4) To acquire by purchase, grant, lease, gift, pursuant to the provisions of the eminent domain procedure law, or otherwise and to use, real property or rights or easements therein necessary for its corporate purposes . . . and to sell, convey, mortgage, lease, pledge, exchange or otherwise dispose of any such property in such manner as the agency shall determine

(6) With the consent of the municipality, to use agents, employees and facilities of the municipality, paying the municipality its agreed proportion of the compensation

or costs;

(8)(a) To appoint an attorney, who may be the counsel of the municipality . . . and to retain and employ private consultants for professional and technical assistance and advice

(9) To make contracts and leases, and to execute all instruments necessary or convenient to or with any person, firm, partnership or corporation, either public or private; provided, however, that any extension of an existing contract, lease or other agreement entered into by an agency with respect to a project shall be guided by the provisions of this article;

(10) To acquire, construct, reconstruct, lease, improve, maintain, equip or furnish one or more projects;

And, to further facilitate its efforts:

(17) To do all things necessary or convenient to carry out its purposes and exercise the powers expressly given in this title.

In its Amended Complaint, Plaintiff alleges that it "was contracted by Defendants to perform oversight and development of quality management systems to meet Mt. Vernon's goals for economic growth and opportunity" and "included within its scope of duties" were to: (1) "[a]ssist the [MVIDA] in review of plans and drawings submitted to the agency and/or any department of the City;" and (2) "[s]ubmit to the [MVIDA] and/or any department of [the City] recommendations for objections, conclusions and approval of said plans and drawings, including using the official forms if requested" (Amended Complaint at ¶¶ 7, 9). While Plaintiff also alleges that pursuant to the first Agreement, it was hired to manage the Buildings Department and ensure that buildings were built in conformance with the City's codes (Amended Complaint [*11] at ¶7), [FN3] and that that Plaintiff assisted the Department of Buildings and the Department of Public Works to perform various services (*id.* at ¶ 10), by no means does Plaintiff allege that those were the only services it provided. Indeed, the Amended Complaint alleges that MVIDA's audited financial statement for 2017 identified the approval of \$292.7 million in MVIDA projects (*id.* at ¶ 16). According to Plaintiff, MVIDA entered into the Agreements to "reorganize and improve the operations of the Building Department and Public Works Department of Mount Vernon (and particularly the former) so that economic development projects contemplated by MVIDA could move forward" (Plf's Mem. at 11).

The allegations of the work performed by Plaintiff appear to comport with at least three permissible activities for an IDA under GML § 858, namely: (1) the IDA's right to pay the municipality its agreed upon proportion of the compensation or cost of using the City's agents, employees and facilities (except in this case, it is alleged that MVIDA paid for additional manpower at the City's agencies to assist MVIDA in the approval of its projects); [\[EN4\]](#) (2) to retain and employ private consultants for professional and technical assistance and advice; and (3) to enter into contracts with any person, firm, partnership or corporation, either public or private (with the caveat that the contract fall within MVIDA's other statutory powers). The allegations in the Amended Complaint are sufficient to support that Agreements entered into with MVIDA, which included Plaintiff's services to the City's Buildings and Public Works Departments to further MVIDA's projects, were authorized under GML § 853 (see *Grossman v Herkimer County Indus. Dev. Agency*, 60 AD2d 172, 173 [4th Dept 1977]; see also *Civil Serv. Forum v New York City Tr. Auth.*, 4 AD2d 117, 127 [2d Dept 1957], *aff'd* 4 NY2d 866 [1958]).

The primary authority on which Defendants rely, an opinion from the New York State Comptroller (2011 Ops St. Comp No. 2011-1), which, while it should be considered, is nonbinding on this Court (*People v Thompson*, 157 Misc 2d 233 [Sup Ct, Nassau County 1993]; *Matter of Nyack Bd. of Educ.*, 77 Misc 2d 116 [Sup Ct, Rockland County 1974]; see also *American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393 [1984] [an Opinion issued by the New York State Attorney General should be considered, but is nonbinding on a court]), does not establish that Plaintiff has no claim against MVIDA. Instead, the Court reads the Opinion as potentially supporting the validity of the Agreements to the extent Universal consultants were working on MVIDA projects while working in the City's two departments. In Opinion 2011-1, the New York State Comptroller responded to an inquiry whether an IDA may hire individuals [\[*12\]](#) as IDA employees and then assign them to serve as the staff of several not-for-profit development corporations. In return, the development corporations had to pay the IDA a fixed annual fee and reimburse the IDA for its gross payroll expense associated with these employees. It appears the purpose of the arrangement was to attempt to make these employees eligible for the New York State and Local Employees' Retirement System. The development corporations were further required to indemnify the IDA with regard to any actions arising in connection with the employment of the individuals. The State Comptroller opined that GML § 858 did not empower IDAs to loan its employees to the not-for-profit development corporations and, instead, that GML § 858 "lends support for reading article 18-A as not authorizing any other personnel sharing" (*id.* at 4) other than personnel

sharing with a municipality, which the State Comptroller deemed as authorized. The State Comptroller further stated that an IDA has the express power to appoint officers, agents and employees to enable the IDA to carry out its functions, which is what the Amended Complaint alleges occurred here. Here, although there is no factual record in this case, it may be that MVIDA's arrangement with Universal and the City fits squarely within this recognized power. Based on all the foregoing reasons, the branch of Defendants' motion seeking to dismiss the First Cause of Action shall be denied.

Finally, because Defendants have failed to establish that the Agreements are illegal or otherwise unenforceable because MVIDA was not empowered under the GML to enter into these Agreements, the Court does not agree with Defendants' argument that Plaintiff has failed to sufficiently allege claims of *quantum meruit* or unjust enrichment. Here, Defendants are denying the existence of the Agreements at issue, which gives Plaintiff the right to plead quasi contract theories of recovery in the alternative to its breach of contract claim ([Thompson v Horowitz](#), [141 AD3d 642](#) [2d Dept 2016]; [Hochman v LaRea](#), [14 AD3d 653](#) [2d Dept 2005]).

Regarding Defendants' contention that the Amended Complaint makes clear that MVIDA was not enriched by Universal's alleged services because the Agreements state that the services are to be provided to the City's departments (*i.e.*, the Department of Buildings and the Department of Public Works) and "[w]hatever services Universal claims it rendered, they were not rendered to the MVIDA," the Court does not agree that the Amended Complaint fails to identify a benefit being conferred on MVIDA. The Agreements explicitly identify services that were being rendered for MVIDA's benefit and whether the services Universal provided actually benefitted MVIDA cannot be determined in the context of a motion to dismiss, where the Court must accept the allegations of the complaint as true unless utterly refuted by documentary evidence. Because the Agreements do not utterly refute that MVIDA benefitted from the services Universal provided, the Amended Complaint adequately pleads a direct and specific benefit to MVIDA resulting from Plaintiff's services. Accordingly, the branches of Defendants' motion seeking to dismiss the Second and Third Causes of Action shall be denied.

C. Plaintiff Has Asserted a Valid Cause of Action for Account Stated Against MVIDA

In response to Defendants' contention that it has not stated a valid cause of action for account stated, Plaintiff argues that it alleges that it "tendered monthly invoices and reports to IDA," which received the invoices and "never disputed any of the invoices or reports issued by the Plaintiff, or rejected any of them," and that, "[d]espite due demand by Plaintiff, Defendant [MVIDA] has failed and refused to pay for services performed in accordance with the terms and conditions of the Agreement" (Amended Complaint at ¶¶ 35-37).

"An account stated is an agreement between parties, based upon their prior transactions, with respect to the correctness of the account items and the specific balance due. . . Although an [*13] account stated may be based on an express agreement between the parties as to the amount due, an agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" (*Bashian & Farber, LLP v Syms*, 147 AD3d 714, 715 [2d Dept 2017]; see also *Chisholm-Ryder Co., Inc. v Sommer & Sommer*, 70 AD2d 429, 431 [4th Dept 1979] ["An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time because the party receiving the account is bound to examine the statement and object to it, if objection there be. Silence is deemed acquiescence and warrants enforcement of the implied agreement to pay... An agreement may also be implied if the debtor makes partial payment. The partial payment is considered acknowledgment of the correctness of the account").

Here, based on Plaintiff's allegations that it submitted invoices and a final statement to MVIDA and that MVIDA never objected or questioned the invoices and final statement it received until the action was filed, Plaintiff has alleged facts sufficient to support its claim against MVIDA for account stated. Accordingly, the branch of Defendants' motion seeking to dismiss the Fourth Cause of Action shall be denied.

CONCLUSION

Based on the foregoing, and for the reasons set forth above, it is hereby

ORDERED that the motion by Defendants Industrial Development Agency of Mount Vernon, New York and City of Mount Vernon, New York is granted in part and denied in part; and it is further

ORDERED that the branches of the motion seeking to dismiss the Fifth, Sixth and Seventh Causes of Action are granted and said causes of action are dismissed with prejudice; and it is further

ORDERED that in all other respects, Defendants' motion is denied; and it is further

ORDERED that Defendant and counsel shall appear for a trial readiness conference via Skype on November 4, 2020 at 9:30 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 22, 2020
White Plains, New York
HON. GRETCHEN WALSH, J.S.C.

Footnotes

Footnote 1: Plaintiff's allegation that the letter from the City's Buildings Commissioner, which stated that as of "October 4th, 2019, the City of Mount Vernon Department of Buildings is canceling Universal Engineering Services (UES), as a consultant," "acknowledged the obligations of Mt. Vernon to pay Plaintiff for the services under the Agreement and Amended Agreement, and the fact that Plaintiff's contracts had been duly and lawfully approved by Mt. Vernon" is insufficient to support the City's compliance with its Charter (Amended Complaint at ¶ 18). Similarly, the letter from the Buildings Commissioner dated May 18, 2017 (Amended Complaint, Ex. C) confirming that Plaintiff was an approved Special Inspection and Code Consultation Agency for the City is insufficient to allege compliance with the City's Charter.

Footnote 2: It is also well settled that "there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim" (*Randall's Is. Aquatic Leisure*, 92 AD3d 463). Thus, "[a] party cannot recover in quantum meruit where there is an express agreement that covers the same subject matter" (*Goldman & Assoc., LLP v Golden*, 115 AD3d 911, 912 [2d Dept 2014]).

Footnote 3: Given the current procedural posture of this motion, the Court shall not determine at this time if it was proper for MVIDA to pay Universal consultants to assist the Buildings Department and the Public Works Department in performing tasks unrelated to MVIDA projects. It is enough that the allegations of the Amended Complaint support Plaintiff's claim that it contracted with MVIDA to provide services that comported with MVIDAs' authority under GML § 853 to enter into such service contracts as the services (at

least in part) related to obtaining the City's approval of MVIDA projects.

Footnote 4: Given MVIDA's right, pursuant to GML § 858(6) to engage in personnel sharing with the City's consultants or employees utilized on MVIDA projects, the Court views the allegations concerning the manner in which MVIDA accomplished this objective (*i.e.*, retaining Universal consultants to supply the additional manpower needed in the City departments to work on the approvals of MVIDA projects), to potentially be a distinction without a difference.

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