

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

219

CA 19-00335

PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

ROGER DOYLE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GEORGE A. NOLE AND SON, INC.,
DEFENDANT-RESPONDENT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County
(Bernadette T. Clark, J.), dated February 8, 2019. The order granted
the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Memorandum: Plaintiff, a subcontractor on a construction
project, commenced this action seeking compensation, under several
legal theories, for extra work performed on the project. He appeals
from an order granting defendant's motion for summary judgment
dismissing the complaint.

Initially, we note that plaintiff does not address in his brief
the propriety of the dismissal of his claims for recovery under
theories of quantum meruit or account stated, and thus plaintiff has
abandoned any issue with respect thereto (*see Ciesinski v Town of
Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

With respect to the remaining claims, we conclude that defendant
met its initial burden on the motion (*see generally Alvarez v Prospect
Hosp.*, 68 NY2d 320, 324 [1986]). "It is well settled that [c]ontract
clauses that require the contractor to promptly notice and document
its claims made under the provisions of the contract governing the
substantive rights and liabilities of the parties . . . are . . .
conditions precedent to suit or recovery" (*Accadia Site Contr., Inc. v
Erie County Water Auth.*, 115 AD3d 1351, 1352 [4th Dept 2014] [internal
quotation marks omitted]), and "a condition precedent is 'an act or
event, other than a lapse of time, which, unless the condition is
excused, must occur before a duty to perform a promise in the
agreement arises' " (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d

640, 645 [2009]; see *Accadia Site Contr., Inc.*, 115 AD3d at 1352). Here, defendant established that the parties entered into a written subcontract for a construction project and that defendant paid plaintiff the full amount due under the subcontract plus additional amounts for extra work that was pre-approved by defendant. Defendant further established that the subcontract provided that plaintiff would be compensated only for extra work that had been previously approved in writing by defendant's principal, that plaintiff was required to submit written notice of claim for payment for such extra work within 10 days of receiving notice that the extra work was required, and that plaintiff's "claim for price adjustment shall be waived" if no such written notice of claim was timely provided. Finally, defendant established that plaintiff neither received a written change order for the extra work that is the subject of this action nor submitted a timely notice of claim regarding such work.

Plaintiff failed to raise a triable issue of fact in opposition (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Even assuming, arguendo, that the document that plaintiff prepared and allegedly showed to defendant's principal was sufficient to constitute a written claim within the meaning of the contract, we conclude that, by "failing to submit any evidence demonstrating which work was performed pursuant to the original fixed price contract, and which work was performed in addition to the work contemplated in the original contract, plaintiff failed to establish [his] right to recover for the extra work performed" (*Ludemann Elec., Inc. v Dickran*, 74 AD3d 1155, 1156 [2d Dept 2010]). Consequently, plaintiff failed to "raise an issue of fact whether [he] performed the extra work with the implied or express promise that [he] would be paid for it over and above the subcontract amount" (*Adonis Constr., LLC v Battle Constr., Inc.*, 103 AD3d 1209, 1210-1211 [4th Dept 2013]).

Finally, we conclude that plaintiff failed to submit evidence that would raise a triable issue of fact "that defendant, by its words or conduct, waived the written notice of claim provision or told plaintiff that the claim did not have to be in writing" (*Kingsley Arms, Inc. v Sano Rubin Constr. Co., Inc.*, 16 AD3d 813, 815 [3d Dept 2005]).

We have considered plaintiff's remaining contentions and conclude that they lack merit.