

SHORT FORM ORDER

INDEX No. 64165-13

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/21/14
SUBMIT DATE: 3/7/14
Mot. Seq. # 001 - MG
CDISP: Yes

-----X		
JODY ENTERPRISES OF BABYLON, INC.,	:	McGIFF HALVERSON, LLP
	:	Attys. For Plaintiff
Plaintiff.	:	96 So. Ocean Ave.
	:	Patchogue, NY 11772
-against-	:	
	:	STAGG, TERENZI, CONFUSIONE
TOWN OF BABYLON,	:	Attys. For Defendant
	:	401 Franklin Ave. - Ste. 300
Defendant.	:	Garden City, NY 11530
-----X		

Upon the following papers numbered 1 to 11 read on this motion by the defendant to dismiss the complaint Order To Show Cause/Notice of Motion and supporting papers: 1-3; 4-5; Notice of Cross Motion and supporting papers _____; Answering papers _____; Reply papers _____; Other 6-7 (plaintiff's memorandum); 8-9 (defendant's reply memorandum); 10-11 (defendant's memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the defendant to dismiss the plaintiff's complaint is considered under CPLR 3211(a)(1) and (a)(7) and is granted.

This action arises out of the plaintiff's submission of a bid in response to the defendant's request for a proposal with respect to residential garbage, recycling and yard waste collection services in 2012. By resolution dated June 22 2012, the Town Board announced a conditional award of the contract to the plaintiff. A proposed contract was forwarded by the defendant to the plaintiff which contained a representation that the plaintiff would, by the commencement of the contract, own, lease or have binding and enforceable contractual rights to use during the term of the agreement and any extensions thereof, the trucks and other equipment delineated elsewhere in the agreement and would furnish proof thereof of such ownership lease or contractual rights (*see* ¶ 11 of the Complaint). The plaintiff alleges that it undertook to buy and refurbish garbage trucks and to install therein GPS systems and spent other time and money coordinating collection route maps and in procuring other equipment and real property allegedly called for by the terms of the agreement (*see* ¶ 12 of the

Complaint). After these expenditures were made, the defendant Town withdrew the collection contract as it concluded, after a hearing, that false information was included in the bid submissions of the plaintiff (*see* ¶¶ 13-15 of the Complaint). The Town Board's determination was set forth in Resolution numbered 555 dated September 10, 2012 (*see* ¶ 15 of the Complaint).


In the complaint served herein, the plaintiff seeks recovery of the amounts it expended in readying itself for the performance of the collection contract. The four causes of action advanced in the complaint sound in: 1) Promissory Estoppel; 2) Breach of Implied Covenant and Fair Dealing; 3) Quantum meruit; and 4) Unjust enrichment.

In response, the defendant Town interposed this motion to dismiss each of the four causes of action advanced in the complaint. In support of its motion, the defendant relies heavily on the fact that no collection contract was ever executed by the parties and that the Town's Final Request For Proposal ("FRFP") expressly provided that the parties would not be bound until they signed a subsequent agreement. The Town contends that in the absence of such a contract, there are no viable claims for recovery of the plaintiff's expenditures under theories of promissory estoppel or breach of the covenant of good faith and fair dealing. In addition, the Town contends that the absence of a signed contract the existence of the other circumstances surrounding the parties' dealings preclude the plaintiff's recovery of monies spent in anticipation of the contract under theories of quantum meruit and/or unjust enrichment. The defendant town thus demands dismissal of the complaint pursuant to CPLR 3211(a)(1) or (a)(7).

With these contentions, the court agrees and thus grants the defendant's motion for dismissal pursuant to CPLR 3211(a)(7) (*see StarVest Partners II, L.P. v Emportal, Inc.*, 101 AD3d 610, 957 NYS2d 93 [1st Dept 2012]; *Moulton Paving, LLC v Town of Poughkeepsie*, 98 AD3d 1009, 950 NYS2d 762 [2d Dept 2012]; *ADCO Elec. Corp. v HRH Constr., LLC*, 63 AD2d 653, 880 NYS2d 188 [2d Dept 2009]; *Jordan Panel Sys., Corp. v Turner Constr. Co.*, 45 AD3d 165, 841 NYS2d 561 [1st Dept 2007]; *Clifford R. Gray, Inc. v LeChase Constr. Serv., LLC*, 31 AD3d 983, 819 NYS2d 182 [3d Dept 2006]; *Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213, 804 NYS2d 301 [1st Dept 2005]; *H & R Project Assoc., Inc. v City of Syracuse*, 289 AD2d 967, 737 NYS2d 712 [4th Dept 2001]; *see also Jfk Intern. Air Cargocentre, LLC v The Port Authority of New York and New Jersey*, 2013 WL 4505138 [Sup. Ct. New York County 2013]).

In view of the foregoing, the instant motion (#001) by the defendant Town of Babylon for dismissal of the complaint is granted.

DATED: 4/3/14



THOMAS F. WHELAN, J.S.C.