

CAUSE NO. DC-22-16546

AZB LAS COLINAS, L.P.	§	IN THE DISTRICT COURT
Plaintiff/Counter-Defendant,	§	
	§	
	§	
v.	§	101ST JUDICIAL DISTRICT
	§	
	§	
RESTAURANT & RETAIL	§	
NATIONWIDE CONTRACTING	§	
SERVICES, LLC.	§	
Defendant/Counter-Plaintiff	§	DALLAS COUNTY, TEXAS

**PLAINTIFF’S AMENDED ANSWER TO
DEFENDANT’S THIRD AMENDED COUNTERCLAIM**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES AZB LAS COLINAS, L.P., (hereinafter called the “AZB”) in the above matter complaining of RESTAURANT & RETIAL NATIONWIDE CONTRACTING SERVICES, LLC (hereinafter called the “RRN”) and for cause of action shows unto the Court the following:

I. VERIFIED DENIAL

1. Pursuant to Rule 93 of the Texas Rules of Civil Procedure, AZB submit a verified denial that:

- (a) RRN has no legal capacity to sue because “Restaurant & Retail Nationwide Contracting Services, LLC” is not registered to conduct business in the State of Texas.
- (b) RRN is not entitled to recover in the capacity in which it sues because “Restaurant & Retail Nationwide Contracting Services, LLC” is not registered to conduct business in the State of Texas.
- (c) there is a defect of parties, AZB or RRN for the aforementioned reasons.

II. GENERAL DENIAL

2. Pursuant to Rule 92 of the Texas Rules of Civil Procedure, AZB generally deny each and every, all and singular material allegations contained in RRN's Third Amended Counterclaim and demand strict proof by a preponderance of the evidence.

III. AFFIRMATIVE DEFENSES

3. Pleading and without waiving the foregoing verified and general denials, even if RRN proves the allegations set forth in its Third Amended Counterclaim, AZB is not liable because:

4. AZB asserts the affirmative defense of **failure to state a claim upon which relief may be granted**:

(a) RRN's Third Amended Counterclaim for quantum meruit should be dismissed. AZB is not liable for quantum meruit against RRN because AZB and RRN have a binding contract of which RRN seeks recovery. Under Texas law, a party who seeks to recover the reasonable value of services rendered or materials supplied through a quantum-meruit claim generally may do so only when there is no express contract covering those services or materials. *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988).

(b) RRN's Third Amended Counterclaim for promissory estoppel should be dismissed. AZB is not liable for promissory estoppel against RRN because AZB and RRN have a binding contract of which RRN seeks recovery. Promissory estoppel is not applicable to a promise covered by a valid contract between the parties. *Trevino & Assocs. Mech., L.P. v. Frost Nat'l Bank*, 400 S.W.3d 139, 146 (Tex. App.—Dallas 2013, no pet.); *see also Stable Energy, LP. v. Kachina Oil & Gas, Inc.*, 52 S.W.3d 327, 336 (Tex. App.-Austin 2001, no pet.) ("If an alleged promise is part of a valid contract, the promisee cannot disregard the contract and sue for reliance damages under the doctrine of promissory estoppel.").

(c) RRN's Third Amended Counterclaim for violations under the Texas Trust Fund Act should be dismissed. AZB did not receive construction payments and/or loan receipts to be utilized in the payment of construction and/or repair of the Property by RRN.

5. AZB asserts the affirmative defense of **first to breach and/or prior material breach**. RRN breached its contract with AZB first by violating provisions of the parties' Fixed Price Construction Contract, including but not limited to §§ 1-5, 7-9, 12, 13, 16-19, and 25.

6. AZB asserts the affirmative defense of **unclean hands**. RRN engaged in inequitable behavior, e.g., deceit and fraud, by acts including but not limited to: (a) intentionally filing a fraudulent lien and seeking damages for work that fails to comply with the parties Fixed Price Construction Contract; and (b) failing to disclose AZB could not hire a third-party contractor to perform HVAC duct work under RRN's permit and requiring AZB to use RRN's designated subs and estimates which included additional profit and overhead costs.

7. AZB asserts the affirmative defense of **failure to satisfy conditions precedent**. RRN's conduct includes, but is not limited to: (a) failure to give AZB at least 35 days notice of outstanding payment prior to *attempting* to place a lien on AZB's interest in the Property; and (b) failure to inspect the Property pursuant to the parties Fixed Price Construction Contract.

8. AZB asserts the affirmative defense of **anticipatory repudiation** including but not limited to the following: AZB provided notice to RRN of its dissatisfaction with RRN's performance pursuant to the Fixed Price Construction Contract including delays and objections to applications for payment.

9. AZB asserts the affirmative defense of **set off** including but not limited to: RRN provided Application for Payment 10 on or about September 19, 2022. At such time AZB had, pursuant to the Fixed Price Construction Contract, incurred \$768,000.00 in delay damages, less the

outstanding contract price.

10. AZB asserts the affirmative defense of **waiver**. RRN waived its alleged rights to the alleged contractual terms it has sued on relation to the requirements to be met before it is paid for work. RRN waived its alleged rights, claims, breaches, and damages by intentional relinquishment of the rights, claims, breaches, and damages, and intentional conduct inconsistent with claiming the rights, claims, breaches, and damages. RRN had actual knowledge of the existence of the alleged rights, claims, breaches, and damages. RRN acted with intent to relinquish the alleged rights, claims, breaches, and damages, e.g., continuing performing work on the project, not otherwise enforcing compliance with the alleged rights. RRN assumed the responsibility of foreseeable risks and hazards under Section 1 of the Fixed Price Construction Contract. Further, despite AZB's efforts to reconcile questions regarding RRN's Applications for Payment, RRN continued performance without payment. RRN further represented it inspected the Property including but not limited to the condition of the concrete, HVAC, lighting, and general construction conditions. RRN had notice of the COVID-19 pandemic and/or acts of God including but not limited to awareness of supply chain delays. RRN's actions also constituted **modification** of the contract terms to remove the alleged rights on which RRN is allegedly suing.

11. AZB asserts the affirmative defense of **fraud** including but not limited to the following: RRN engaged in intentionally fraudulent behavior by intentionally filing a fraudulent lien and seeking damages for work that fails to comply with the parties Fixed Price Construction Contract. RRN further represented it could perform the Contract on or before January 3, 2022, for which AZB detrimentally relied.

PRAYER

WHEREFORE, Plaintiff/Counter-Defendant, AZB LAS COLINAS, L.P., prays this Court,

upon notice and hearing, issue a take nothing judgment against Defendant/Counter-Plaintiff, RESTAURANT & RETIAL NATIONWIDE CONTRACTING SERVICES, LLC, assess costs against Defendant/Counter-Plaintiff, RESTAURANT & RETIAL NATIONWIDE CONTRACTING SERVICES, LLC, and award Plaintiff/Counter-Defendant, AZB LAS COLINAS, L.P., any and all other relief, in law or in equity, to which they may be entitled.

Respectfully submitted,

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