

**BZ Mech. Group, Inc. v 90 William St. Dev. Group
LLC**

2011 NY Slip Op 31467(U)

May 19, 2011

Supreme Court, Nassau County

Docket Number: 9988-09

Judge: Steven M. Jaeger

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

BZ MECHANICAL GROUP, INC.,

Plaintiff,

-against-

90 WILLIAM ST. DEVELOPMENT GROUP
LLC, and PROCIDA CONSTRUCTION
CO., INC.,

Defendants.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 9988-09

DECISION AND ORDER AFTER NON-JURY TRIAL

Plaintiff, BZ MECHANICAL GROUP, INC. (hereinafter, BZ) commenced this action for breach of contract and an account stated against 90 WILLIAMS ST. DEVELOPMENT GROUP, LLC (hereinafter, 90 WILLIAMS) and PROCIDA CONSTRUCTION CO. INC. (hereinafter, PROCIDA) in connection with services provided by Plaintiff for the improvements and conversion of the real property located at 90 Williams Street, New York, New York, into a 113 unit residential condominium.

The case was tried before this Court on February 14, 15, and 16, 2011. Thereafter, post-trial memoranda were submitted.

Branimir Branko Zivkovic, the owner and president of BZ, testified that his company installs and maintains HVAC (heating, ventilation and air conditioning)

equipment. BZ sent a bid proposal to PROCIDA on August 16, 2006 to perform the HVAC work on the project after reviewing the design drawings and specifications. Zivkovic had spoken to Mario Procida before submitting the bid.

Zivkovic was advised that the bid was accepted and, at a meeting with Mario Procida of PROCIDA CONSTRUCTION, BZ agreed to a reduced contract amount of \$1,990,000. BZ was to supply and install approximately 350 to 400 Trane heat pumps, exhaust systems, duct work, fans, air outlets, and condenser water pumps.

A written contract was prepared and sent to BZ, but it was never signed. The standard form contract listed PROCIDA as the Construction manager and 90 WILLIAMS as the fee owner of the property. PROCIDA and 90 WILLIAMS submitted the contract between them which retained PROCIDA to serve as its agent and a "not at risk" construction manager. This was also expressly noted on the face of the unexecuted contract between PROCIDA and BZ. Zivkovic did not sign the proposed contract because he had concerns that PROCIDA, who paid BZ, was an owner of the property and not the owner's agent/construction manager. However, all parties proceeded based upon the unsigned contract.

A payment request from BZ, marked "#15 + Final", and dated March 16, 2009, was placed into evidence. Zivkovic stated that BZ had completed the agreed upon work and had done approved extra work valued at \$166,506. He also stated that BZ was paid \$1,958,588.50 and that PROCIDA paid \$98,661.71 to Trane on BZ's account. Thus, BZ claimed it was still owed \$99,255.79.

BZ paid directly to purchase the Trane units, except for the \$98,661.71 paid by

PROCIDA. While there were claims BZ had financial problems, Zivkovic denied this and no proof was offered by any party. Zivkovic testified that the \$98,000 paid by PROCIDA to Trane was due to a problem with materials supplied by Trane, a subsequent lien filed by Trane, and PROCIDA holding monies owed to BZ. Zivkovic testified that BZ completed the agreed upon work and extra work pursuant to change orders.

Although discussions were had concerning the amount BZ claimed it was owed, and BZ claimed there were promises to pay the amount owed, such payment was never made. He acknowledged that PROCIDA claimed BZ's work was not completed and was not satisfactory performed, but denied this was true.

Zivkovic testified that BZ's work was completed and the HVAC system was operational during the winter of 2007-2008, and, more specifically, by March, 2008. Plaintiff BZ left the job approximately August 21, 2008 and BZ received no payments after April, 2008. The disputes as the amount owed and the work remaining to be done, including leaks in the air conditioning units, resulted in ongoing discussion and a meeting in August, 2008, but there was no resolution. Plaintiff was advised in the meeting on August 21, 2008 of backcharges due to water leaks when the air conditioning system was turned on in the spring.

BZ also submitted evidence that on June 30, 2008, PROCIDA's project manager, Ryan Tunstall, prepared a "check request form" showing BZ was owed \$40,930.79. However, this amount was never paid. Tunstall denied that this form indicated or approved payments, claiming rather that it was an internal document to analyze the

status of the job and the BZ account. He did give a copy to Zivkovic in August, 2008.

Ryan Tunstall was the project manager for PROCIDA starting in the summer of 2006. He received the bid from BZ, but the final price of \$1,990,000, was agreed upon by Zivkovic and Mario Procida. Although the written contract was never signed, BZ started work in late 2006 or early 2007.

Tunstall stated that when BZ left the job in August, 2008 its work had not been completed. He also stated BZ's work was not done properly and additional work and repairs had to be done by other contractors. Tunstall discussed these issues with Zivkovic during the course of the project by e-mails and meetings. He also kept a repair log beginning sometime after this litigation commenced.

Tunstall both testified and offered documentary evidence in support of 90 WILLIAMS' counterclaim in the amount of \$127,491.83, due to the problems associated with the work performed by BZ.

Tunstall retained and paid several contractors to repair damages and correct defects in the work done by BZ. RGA Mechanical was hired to correct deficiencies in BZ's work and did service work on the Trane units throughout the building from November 20, 2008 through February 4, 2009. PROCIDA paid RGA a total of \$21,151.22. Copies of the invoices for all work done by RGA were admitted in evidence.

HVAC Service New York Inc. was also brought in to do repairs and service on various Trane units from July 29, 2009 through September 1, 2010. PROCIDA paid HVAC Service a total of \$40,740.61. Copies of the invoices for all work done by HVAC

Service were admitted in evidence.

Lincoln Air Corp. was hired to install isolation pads underneath the circulator pumps in the rooftop mechanical room. Tunstall said Lincoln was paid \$3,000 for this work, but only an undated proposal was submitted from Lincoln Air, which included other work, and no proof of payment was provided.

M & P Construction Inc. was hired to repair damages caused by BZ in disrupting another trade's work, such as or changed locations of ducts and other equipment. This work (backcharged to BZ) was done between June 21, 2007 and November 21, 2007. PROCIDA paid M & P \$5,800 for this work according to Tunstall. The invoices were admitted in evidence.

All of the above work was either required to be performed by BZ and not done or was attributable to damages caused by BZ.

Tunstall stated that the most significant backcharges attributable to BZ were due to leaks in the Trane units that caused damage to the wood floors. He stated that most of the leak damage was attributable to the Trane heat pump units themselves.

C & I Hardwood Floors Corp. was hired to repair or replace the floors during the period from February 21, 2008 through July 13, 2009. While PROCIDA paid C & I a total of \$131,067.63 for its services, Tunstall calculated the amount attributable to BZ to be "...approximately a third of the units, equaling approximately \$40,000". Copies of the invoices from C & I were admitted in evidence.

Additionally, 90 WILLIAMS asked for \$16,000 to perform additional work not done by BZ. Tunstall testified to a summary or "list" of things, some still not completed

and some done by other contractors. Tunstall "estimated" the cost of completing the HVAC system "items on this to be approximately \$16,000".

Upon reviewing the testimony and exhibits introduced into evidence, the Court finds that plaintiff BZ has failed to prove its claims of breach of contract and account stated against PROCIDA and 90 WILLIAMS for the reasons set forth below.

First, it is clear from both the testimony of BZ's owner and from PROCIDA's employee, as well as the documentary evidence, that PROCIDA acted only as an agent for a disclosed principal. The evidence further establishes that BZ was aware of the nature of this relationship before it commenced work (although Zivkovic did not accept this as a truthful disclosure).

The language of both the contract between PROCIDA and 90 WILLIAMS and the proposed contract between PROCIDA and BZ was that of a disclosed agency relationship. Zivkovic stated he knew that from reading the proposed contract.

No proof was put before the Court to suggest that PROCIDA waived this relationship or otherwise intended to substitute its liability for that of 90 WILLIAMS.

Packham Road Corp. v. Town of Putnam Valley, 218 AD2d 789.

Accordingly, Plaintiff's claims against PROCIDA for breach of contract and an account stated cannot stand.

Second, Plaintiff also failed to establish any breach of contract claim. The elements of such a claim are the existence of a contract between the parties, performance by the plaintiff, breach by the defendant, and damages resulting from the breach. *Furia v. Furia*, 116 AD2d 694.

Since the parties acted pursuant to the terms of the unsigned contract, the agreement may still be enforced even absent execution. *God's Battalion of Prayer Pentecostal Church Inc. v. Miele Assocs., LLP*, 10 AD3d 671.

Plaintiff's claim of breach is based on change orders it performed at the project. However, no proof was offered other than the testimony of BZ's president.

There was no proof of the change orders themselves, just a summary of same. There was no proof of the reasonable value of the work done pursuant to the change orders, what they were for, who ordered them and when, who performed them and when, how the amounts charged were calculated, and whether PROCIDA agreed to pay same.

Plaintiff's Exhibit 10, additional work proposals, were all dated after BZ left the job. Plaintiff's Exhibit 11, dated August 20, 2007, merely lists a total for change orders and Exhibit 12 shows that PROCIDA disputed or sought further information on the additional work proposals BZ submitted January 29 & 30, 2008.

Finally, Plaintiff failed to establish its claim for an account stated. While monthly requisition statements were sent, the final requisition placed in evidence dated March 16, 2009, was not paid due to the continuing discussions and dispute about problems associated with the work done by plaintiff.

Thus, it is clear from the evidence taken as a whole that the parties were in an ongoing dispute as to the value of BZ's work, what was owed, if anything, to BZ, and the amount of backcharges to BZ. An account stated cannot be established when a defendant contests the amount claimed. *M & A Const. Corp. v. McTague*, 21 AD3d

610; *Abbott, Duncan & Weiner v. Ragusa*, 214 AD2d 412; *Nebraskaland Inc. v. Best Selections, Inc.*, 303 AD2d 662.

As to 90 WILLIAMS' counterclaim, the appropriate measure of damages as quoted by defendant is set forth in *Freund v. Washington Square Press, Inc.*, 34 NY2d 379, 382:

In other words, so far as possible, the law attempts to secure to the injured party the benefit of his bargain, subject to the limitations that the injury—whether it be losses suffered or gain prevented—was foreseeable, and that the amount of damages claimed be measurable with a reasonable degree of certainty and, of course, adequately proven. (See, generally, Dobbs, *Law of Remedies*, p. 148; see, also, Farnsworth, *Legal Remedies for Breach of Contract*, 70 Col. L. 1145, 1159.) But it is equally fundamental that the injured party should not recover more from the breach than he would have gained had the contract been fully performed (citations omitted).

Defendant 90 WILLIAMS has not established its right to recover all the items requested in its counterclaim. Defendant has not proven certain amounts claimed “with a reasonable degree of certainty” and has not “adequately proven” others.

Based on the credible evidence, the Court finds that defendant is entitled to recover only for the following items on its counterclaim:

RGA	\$21,151.22
HVAC Service	\$40,740.61
M & P	<u>\$ 5,800.00</u>
	\$67,691.83

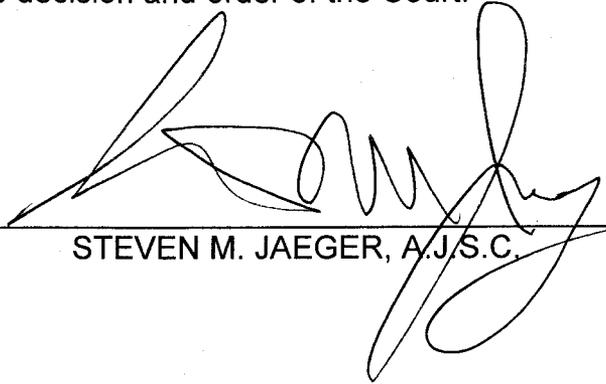
Accordingly, defendant 90 WILLIAMS shall recover the sum of \$67,691.83 from plaintiff, with interest and the costs and disbursements of this action.

Plaintiff's complaint is dismissed as to all causes of action.

Defendant shall submit an Order and Judgment on Notice.

The foregoing constitutes the decision and order of the Court.

Dated: May 19, 2011



STEVEN M. JAEGER, A.J.S.C.

ENTERED
MAY 24 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE