Domewell Restoration, Inc. v Skyline Restoration, Inc.
2004 NY Slip Op 30003(U)
July 29, 2004
Supreme Court, New York County
Docket Number:
Judge: Shirley W. Kornreich
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SCANNED ON 8/5/2004

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **Kornreich, Shirley Werner, J.** PART 54
Justice

[* 1]

DOMEWELL RESTORATION, INC.

Plaintiff,

-against-

SKYLINE RESTORATION, INC. and
174 EAST 74 OWNERS CORP.,

Defendants.

INDEX NO. 602222/03

MOTION DATE 06/03/2004

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to: Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers it is ordered that this motion for summary judgment brought by defendant Skyline Restoration, Inc. is decided in accordance with the annexed decision.

FILED
AUG - 5 2004
COUNTY CLERK'S OFFICE
NEW YORK

SHIRLEY WERNER KORNREICH
J.S.C.

Dated: July 29, 2004

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

DOMEWELL RESTORATION, INC.,

Plaintiff,

Index No.: 602222/03

-against-

DECISION, ORDER and JUDGMENT

SKYLINE RESTORATION, INC. and
174 EAST 74 OWNERS CORP.,

Defendants.

----------X

SHIRLEY WERNER KONREICH, J.:

Defendants bring simultaneous motions for summary judgment. C.P.L.R. 3212. Domewell Restoration, Inc. ("Domewell") filed claims to recover under breach of contract, quantum meruit, and account stated against Skyline Restoration, Inc. ("Skyline") following the termination of Domewell's employment. Domewell also filed claims in quantum meruit and unjust enrichment against 174 East 74 Owners Corp. ("Owner") for improvements made to Owner's building. Domewell further sought to enforce a mechanic's lien against defendants.

Facts

On June 22, 2000, Owner entered into a contract with Double "L" Contracting Co. ("Double L") in which Double L was to complete some partial exterior rehabilitation work at 174 East 74th Street for $134,000. Owner's Ex. A. The contract price was subsequently increased to $152,350 pursuant to two change of work orders made with regard to increases in the perceived scope of the project. Owners Ex. C, pp. 1-2.

On October 20, 2000, Double L contracted out the masonry portion of the work to subcontractor Skyline for a price of $69,400. Skyline's Ex. B. Double L conducted the roofing portion of the contract itself. Aff. of John Kalafatis in Skyline's Notice of Mot. ¶2. The contract

price between Double L and Skyline was increased to $78,050 pursuant to two change orders dated October 27, 2000. Skyline's Ex. E, p. 3; Owner's Ex. C, pp. 3-4. The contract price was to be paid 20% upon signing the contract, 10% upon completion of the project, and the remainder of the payments "as work progresses". Owner's Ex. B, p. 2.

Subsequently, Skyline enlisted sub-subcontractor Domewell to complete the masonry work specified under Skyline's contract with Double L. Aff. of Helen Gillas ¶¶9, 10. Domewell contends that no express price was agreed to by the parties. Aff. of Matthew Brozik in Opp. to Owner's Notice of Mot. ¶4; Aff. of Helen Gillas ¶15. Skyline, however, claims that the parties had agreed to a contract price of $50,000 and that this figure was "conveniently erased" from the unsigned document describing the scope of the project provided in Domewell's exhibit A. Reply Aff. of John Kalafatis in Support of Skyline's Mot. ¶3. Skyline further contends that Domewell's exhibit B, an unsigned transaction sheet that Skyline sent to Domewell listing $50,000 under the "Cost of Goods Sold, Subcontractor 1, Labor, Original Amount" column, indicates that the agreed upon price was, in fact, $50,000. Id. Domewell disputes this and claims that exhibit B merely states the estimated labor costs for the project and does not include the cost of materials, scaffolding or overhead. Aff. of Helen Gillas ¶26.

Domewell commenced work at 174 East 74th Street on August 23, 2000. Id. ¶11. On December 18, 2000, after completing a substantial portion of the work, Domewell ceased work at this location. Aff. of John Kalafatis in Skyline's Notice of Mot. ¶3; Aff. of Helen Gillas ¶35. John Kalafatis ("Mr. Kalafatis"), president of Skyline, claims that he fired Domewell for walking out on the job and for its alleged substandard work. Aff. of John Kalafatis in Skyline's Notice of Mot. ¶3; Skyline's Ex. B ¶9. Domewell disputes this and claims that Mr. Kalafatis

instructed it to vacate the job site based on an argument relating to the costs and value of the job. Aff. of Helen Gillas ¶35.

Skyline provides checks that they claim indicate that Domewell accepted payments of $52,924.74 from Skyline on the project at 174 East 74th Street. Skyline's Ex. H, pp. 1-11. However, the majority of the checks do not indicate which project they were written for and Helen Gillas ("Mrs. Gillas"), president of Domewell, claims that Domewell was working on another project for Skyline in the Bronx and that a portion of the check payments were for this other project. Owner's Ex. K (Deposition of Helen Gillas), pp. 44 ll. 8-21, 53 ll. 2-14. Domewell claims that the cost of the labor, materials, overhead, and a 22% profit on the project totaled $166,934.80[1] due to increased costs as the project progressed and that there is an unpaid balance of $115,830.20.[2] Aff. of Helen Gillas ¶¶36-42. However, at no time did Domewell provide Skyline with a bill indicating that such an amount was owing. Aff. of John Kalafatis in Skyline's Notice of Mot. ¶4; Skyline's Ex. G (Deposition of Helen Gillas), pp. 137-138.

To complete the unfinished work at 174 East 74th Street, Skyline claims to have hired Garden Restoration, Inc. ("Garden") for a price of $13,000.[3] Skyline's Ex. I, p. 1. Skyline also claims to have assumed $2,743.42 worth of scaffolding costs that Domewell had allegedly agreed to pay. Id. pp. 8-9; Owner's Ex. L (Aff. of John Kalafatis) ¶5. Upon inspection of the

[1] Domewell's original claim indicated that the "agreed price and/or reasonable value" of the project was $166,818.88. Skyline's Notice of Mot. at Ex. A (Domewell's amended complaint) ¶7. It later claims to have adjusted this number down and that the actual cost of the project was $166,934.80 based on $10,446.10 in materials (shown by receipts for materials and equipment made out to both Skyline and Domewell (Aff. in Opp. at Ex. C)), $41,865 in labor (shown by checks that do not indicate which project they were issued for (Id. at Ex. D)), $30,561.45 in taxes, insurance, and benefits (without documentary evidence), $41,521 in salary and benefits to George Gillas (without documentary evidence), $12,439.25 in overhead (without documentary evidence) and $33,103 in profit. Aff. of Helen Gillas ¶¶36-42.

[2] This leaves $51,104.60 that Domewell claims to have been paid for their work.

[3] The exact amount paid to Garden is unclear. Mr. Kalafatis states in his affidavit for Skyline that Skyline paid Garden $23,700 (which corresponds to the total of all checks paid to Garden for all projects Garden completed for Skyline from January to February of 2001. Skyline's Notice of Mot. at Ex. I, pp. 2-7). However, in his affidavit for Owner he states that Skyline paid Garden only $13,000 (which corresponds to the contract provided between Garden and Skyline (Id. p. 1)). Other statements provided show payments of only $10,000 to Garden. Id. pp. 2-7.

work in October, 2002, Allan Klein determined that it had not been completed correctly. Aff. of Allan Klein ¶¶6, 7. He estimated that in order to repair the work a minimum of $15,000 would have to be expended with the costs likely ranging from $25,000 to $50,000. Id. ¶9.

On August 8, 2001, Domewell filed a lien on 174 East 74th Street based on the alleged $115,830.20 remaining from the $166, 934.80 that Ms. Gillas determined was a reasonable price for the work that they had done. Skyline's Ex. D, and Ex. G (Deposition of Helen Gillas) pp. 140-142. Documentary evidence has established that at the time of filing the lien there was $21,250 owing on the contract between Owner and Double L (Owner's Ex. D, p.7; Aff. of Matthew David Brozik in Opp. to Owner's Notice of Mot. ¶10) and there was $8,050 owing on the contract between Double L and Skyline.[4] Owner's Ex. E.

In October, 2001, Skyline moved for an order canceling and discharging the mechanic's lien filed by Domewell pursuant to: Lien Law §39 based on willful exaggeration, Lien Law §38 based on failure and refusal to furnish an itemized statement of lien claims, and Lien Law §19 based on the lien being void on its face. In re Skyline Restoration and Waterproofing, Inc. v. Dome Well Restoration, Index No. 118342/01 (N.Y. S. Ct., 2002). Alternatively, they sought an order directing payment of a certain sum to discharge the lien. Id. In this action, Domewell cross-moved for an order joining Owner and another party in a separate "related" lien and asserted counterclaims for money due under this and another contract, for the alleged use of Domewell's materials after Domewell stopped working on 174 East 74th Street, and for damages as a result of Skyline's alleged fraudulent inducement and deceit in procuring the agreement. Id. Because at that juncture of the case Domewell had yet to commence proceedings to enforce their

[4] Domewell argues that the fact that only $8,050 was owing on the contract between Double L and Skyline at the time the lien was filed is not proven by the document provided because it was dated one week after the lien was filed. However, at the bottom of the statement it is clearly indicated that on February 20, 2001 only $245 was owing on the contract and that this was subsequently increased by $7,805 on May 7, 2001. This leaves $8,050 owing from May 7, 2001 – several months prior to the filing date of the lien. No contradictory evidence is offered by Domewell.

mechanic's lien, and because it was unclear whether Skyline had properly requested an itemized statement of the lien claims, Skyline's claims were denied without prejudice as was Domewell's cross-claim to add Owner as a party. Id. Domewell's counterclaims were severed and re-assigned to another court and were subsequently disposed of for clerical reasons. Id.

Domewell amended and re-filed its claims in this Court to include claims for: 1) breach of contract, quantum meruit, and account stated against Skyline; 2) quantum meruit and unjust enrichment against Owner; and 3) enforcement of its lien. Skyline now claims that summary judgment is appropriate because there was no agreement between the parties for the amount stipulated, because Domewell was paid for the work that they had done, and because there was no account stated between the parties. Owner claims that summary judgment is appropriate because Domewell did not have privity of contract with Owner, because Owner had a contract with the general contractor under which it paid for the improvements that Domewell claims unjustly enriched Owner, and because there is no sum of money to which Domewell's lien may attach. Owner further asserts a counterclaim against Domewell for willful exaggeration of the lien and requests that summary judgment dismissing the lien be held in abeyance until the counterclaim is adjudicated.[5]

Conclusions of Law

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957); Nicholas Di Menna & Sons, Inc. v. New York, 301 N.Y. 118 (1950). Because it deprives a party of his day in court, it may only be granted if no genuine, triable issue of fact is presented. Ugarriza v. Schmieder, 46 N.Y.2d 471 (1979).

[5] Skyline filed a counterclaim for damages for Domewell's alleged substandard performance but this counterclaim is not at issue on these motions.

Breach of Contract/Quantum Meruit Claims Against Skyline

While Domewell originally claimed that it entered into an express contract with Skyline for $166,818.88, Mrs. Gillas later averred that the parties had not agreed on any price when the project commenced. Aff. of Helen Gillas ¶15. However, Mr. Kalafatis relies on two unsigned documents (Domewell's Ex. A, B) provided by Skyline to Domewell in claiming that the parties had agreed on a price of $50,000. He contends that the first document providing the scope of the project indicated a $50,000 contract price prior to being altered by Domewell. The second document is a transaction sheet compiled by Skyline that lists $50,000 as a total price under a column marked "labor". No conclusive proof has been offered confirming the allegation that the first document was altered and Domewell claims that the $50,000 listed on the second document only refers to the expected amount to be paid for labor and excludes any materials, overhead, or profit margin. Further, neither document is signed by Domewell. A triable issue of fact, thus, exists as to whether or not a price was agreed to by the parties and as to whether the $50,000 figure refers to the total cost of the project or the labor only.[6]

If at trial it is determined that no valid contract was formed because the parties failed to agree on a price, Domewell may then be entitled to recovery under quantum meruit for the reasonable value of the services provided to Skyline. See Rubin v. Cohen, 129 A.D. 395 (1st Dept. 1905). Questions of fact exist with respect to the total value of Domewell's work. Skyline asserts that the maximum reasonable value of the work is the $78,050 contract price between Double L and Skyline less the cost that Skyline had to pay Garden to complete the work and less any costs that would be required to fix the substandard work provided. They then claim that this amount would certainly be exceeded by the amount already paid to Domewell for its services.

[6] It is undisputed that the work took place over a period of less than one year so the Statute of Frauds defense raised by Skyline is inapplicable. CLS Gen Oblig §5-701(a)(1).

Domewell asserts that the reasonable value of the work provided is $166,934.80 and supports this with documentary evidence. As neither party's evidence conclusively establishes the reasonable value of Domewell's work, this presents a question of fact to be determined at trial.

Account Stated Claim Against Skyline

A contention that a transaction amounted to an account stated is without merit where no account was presented to the other `party. Waldman v. Englishtown Sportswear, Ltd., 92 A.D.2d 833 (1st Dept. 1983). Mrs. Gillas admits that Domewell never presented a bill to Skyline thus precluding any claim of account stated. Skyline's Ex. G (Deposition of Helen Gillas) pp. 137 ll. 10-25, 138 ll. 2-13.

Quasi-Contract Claims Against Owner

While there was no contract between Domewell and Owner, Domewell claims that it should be entitled to damages under quasi-contract theory as per its second claim of quantum meruit and its fifth claim of unjust enrichment. However, it is a firmly established principle that a property owner who contracts with a general contractor does not become liable to a subcontractor on a quasi-contract theory unless it expressly consents to pay for the subcontractor's performance. Perma Pave Contracting Corp. v. Paerdegat Boat & Racquet Club, Inc., 156 A.D.2d 550 (2nd Dept. 1989). In the instant case, Owner contracted with Double L as its general contractor and there is no evidence in the record that they consented to pay for Domewell's performance. Thus, no claim based on a theory of quasi-contract may be asserted by Domewell against Owner.

Enforcement of Mechanic's Lien

A subcontractor's lien is restricted to satisfaction out of whatever amount, if any, is due and owing from the owner to the general contractor. Central Valley Concrete Corp. v.

Montgomery Ward & Co., 34 A.D.2d 860 (3rd Dept. 1970) (contractor not entitled to summary judgment against sub-subcontractor's lien claim when it was not shown that no money was owing on contract between contractor and subcontractor at time lien was filed); Dempsey v. Mt. Sinai Hospital, 186 A.D. 334 (1st Dept. 1919) (sub-subcontractor's lien invalid as no money was due from contractor to subcontractor at time lien was filed). The subcontractor's lien attaches not to the total amount owing on the contract but to the amount that is due or will become due on the contract. Dempsey, 186 A.D. at 339.

Here, an account statement was provided showing that at the time the lien was filed only $8,050 was owing on the contract between Double L and Skyline. However, this amount never became due as the work was never satisfactorily completed. The contract between Double L and Skyline stipulated that it was based on the "drawings and specifications prepared by Allan Klein" and that payments would be made as the work progressed. Owner's Ex. B. In 2002, Mr. Klein inspected the work and determined that it had not met such specifications and that completing the work to such specifications would cost a minimum of $15,000 and certainly more than $8,050. Aff. of Allan Klein ¶9. Thus, because at the time the lien was filed the work had not progressed to a point where the final $8,050 was due to Skyline, there were no funds to which Domewell's lien could attach at the time the lien was filed.

Domewell argues that only at trial will it be able to defeat Owner's claims with respect to any necessary repair work attributable to Domewell's work[7] and only at trial will it be able to elicit the true cost of any repair work already performed or the reasonable cost of any repair work to be performed in the future. Given that Mr. Klein, the architect on the project, provided

[7] Even if Domewell could prove that the faulty work was not attributable to Domewell it may still be attributable to Skyline as Skyline hired Garden to complete the job. So long as the faulty work is attributable to the masonry work contracted out to Skyline, the $8,050 would not become due under the contract between Double L and Skyline.

an affidavit that stated that, due to the improper repairs to the masonry units, at least $15,000, and certainly more than $8,050, was required to complete the project satisfactorily, it was incumbent on Domewell to provide evidentiary showing of the existence of an issue of fact on which it rested its claim. See Vermette v. Kenworth Truck Co., Div. of Paccar, Inc., 68 N.Y.2d 714 (1986). As no evidentiary proof was offered, and no excuse was tendered for this lack of proof in admissible form, summary judgment may not be defeated.

Despite summary judgment dismissing the mechanic's lien being prudent at this stage, Owner requests that the Court hold in abeyance such an order of summary judgment so that it may pursue its counterclaim of willful exaggeration of the lien under CLS Lien Law §39(a). However, as the remedy provided by this law is penal in nature it is not available to an owner except in the case where the lien is valid in all other respects and the owner must await a determination of an extended trial in a foreclosure action to have the lien declared void and discharged by reason of its exaggeration. Joe Smith, Inc., v. Otis-Charles Corp., 279 A.D. 1 (4th Dept. 1951), aff'd 304 N.Y. 684 (1952). As the lien in this case was invalid because there were no funds to which it could attach, the remedy provided by CLS Lien Law §39(a) is unavailable to Owner.

Accordingly, it is

ORDERED that the motions are granted to the extent of granting partial summary judgment in favor of defendants Skyline and Owner and against plaintiff Domewell as follows:

1. Skyline is granted summary judgment in the third cause of action for account stated, the third cause of action is severed and dismissed, and the Clerk is directed to enter judgment accordingly;

2. Owner is granted summary judgment in the second and fifth causes of action for quantum meruit and unjust enrichment, the fifth cause of action is severed and dismissed, the second cause of action is severed and dismissed inasmuch as it claims relief against Owner, and the Clerk is directed to enter judgment accordingly;
3. Defendants are granted summary judgment in the fourth cause of action for dismissal of Domewell's mechanic's lien foreclosure, Owner's motion to hold such dismissal in abeyance is denied, the fourth cause of action is severed and dismissed, and the Clerk is directed to enter judgment accordingly;
4. All claims against defendant Owner are dismissed; and
5. The first cause of action, the second cause of action inasmuch as it claims relief against Skyline, and Skyline's counterclaim are severed and shall continue.

The foregoing constitutes the decision and order of the Court.

Date: 7/29/04
New York, New York

SHIRLEY WERNER KORNREICH

FILED
AUG 05 2004
COUNTY CLERK'S OFFICE
NEW YORK