Metropolitan Steel Industries v Perini Corporation
2006 NY Slip Op 30253(U)
March 28, 2006
Supreme Court, New York County
Docket Number: 0104341/2002
Judge: Marilyn Shafer
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SCANNED ON 4/4/2006
[* 1]

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

PRESENT: HON. MARILYN SHAFER PART 36
Justice

METROPOLITAN STEEL INDUSTRIES, INDEX NO. 104341/02

Plaintiff,

-against- MOTION SEQ. NO. 013& 014

PERINI CORPORATION, et. al.,

Defendants.

The following papers, numbered 1 to 10, were read on this motion.

	PAPERS NUMBERED
Notice of Motions — Affidavits — Exhibits	1,2,3,4
Answering Affidavits — Exhibits	5,6,7
Replying Affidavits — Exhibits	8,9,10

FILED
APR 10 2006
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ✓ No

Upon the foregoing papers, it is ordered that Motion Sequences Nos. 13 and 14 are consolidated herein for disposition, and upon consolidation, Motion Sequence No. 13 by plaintiff to add interest is granted to the extent set forth below, and Motion Sequence No. 14 by defendants to set aside the verdict is denied.

Background

Defendants Perini Corporation, American Home Assurance Company, Fidelity and Deposit Company of Maryland and Liberty Mutual Insurance Company (collectively "Perini")

bring this motion to set aside the jury verdict rendered on April 14, 2005, or in the alternative, a motion for a new trial on the issue of damages.

This action arises out of the design and construction of a multi-storied bus depot, located at 100th Street and Lexington Avenue in Manhattan ("the project"), owned and operated by the New York City Transit Authority ("NYCTA"). Perini entered into a contract with the NYCTA for the design and construction of the project for the amount of $88,728,800 ("Prime Contract"). Perini entered into a Subcontract with plaintiff Metropolitan Steel Industries, Inc. ("Steelco") on August 30, 2000, wherein Steelco was to furnish certain work, labor, material, services and equipment for the fabrication and erection of structural steel and a metal deck necessary for construction of the project, for the amount of $9,630,000 ("Subcontract"). Steelco commenced work on the project. By September 2000, Steelco began informing Perini that STV, Inc. ("STV"), Perini's design consultant for the project, was not providing accurate structural steel designs, that as a result Steelco's work was being delayed, and that it would hold Perini liable for costs incurred as a result of any omissions, delays and interferences which substantially altered, changed, modified, or interfered with its work. Steelco commenced the instant action against Perini seeking to recover the unpaid balance due on its contract, as well as for additional and extra work it performed in connection with the project. Thereafter Perini commenced a third-party action against STV, Inc.

Trial Proceedings

On April 4, 2005, a jury trial commenced to determine the balance, if any, left on the Subcontract and the value of extra work items performed by Steelco pursuant to the Subcontract. For each change order proposal, the jury was asked to determine if any amount was due and if so,

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whether said amount constituted an amount due to Steelco from Perini, or an overpayment from Perini to Steelco. On April 14, 2005, the jury rendered a verdict in favor of Steelco, in the total amount of $1,948,688. The jury unanimously found that Perini owed (or overpaid, as set forth in parenthesis) Steelco the following amounts:

a)	Balance on base contract:	$576,441
b)	Change Proposal X-1	$ 18,264
c)	Change Proposal X-2	$ 25,198
d)	Change Proposal X-6	$176,431
e)	Change Proposal X-7	$ 4,645
f)	Change Proposal X-10	$ 33,711
g)	Change Proposal X-11	$383,303
h)	Change Proposal X-12	$ 3,729
I)	Change Proposal X-13	$ 23,013
j)	Change Proposal X- 16	($ 1,891)
k)	Change Proposal X- 22A	$ 44,155
l)	Change Proposal X- 23	$ 29,818
m)	Change Proposal X- 24	$247,861
n)	Change Proposal X- 25A	$412,615
o)	Change Proposal X- 26A	$ 1,846
p)	Change Proposal X- 32A	$ 48,792
q)	Change Proposal X- 35	$ 68,680
r)	Change Proposal X- 38	$ 1,224
s)	Change Proposal X- 39	$ 841
t)	Change Proposal X- 46	($141,455)
u)	Change Proposal X- 48	($ 14,260)
v)	Change Proposal X- 50	$ 5,727

Motion to Set Aside the Verdict

Perini alleges that the verdict should be set aside because pursuant to the Subcontract, Steelco is not entitled to any additional payments for extra work, that pursuant to the "plain meaning" of Article 5 of Exhibit A to the Subcontract[1] "Article 5"), which provides that

[1] "The Subcontractor recognizes that this is a design/build project and understands and acknowledges that this Agreement was negotiated and accepted on the basis of preliminary and/or conceptual plans listed in the Steelco Proposal of August 7, 2000 which do not fully show

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Steelco's scope of work would include the final structural steel plans and specifications prepared by STV, Steelco was aware that it would have to perform work beyond what was based upon the preliminary plans Perini further alleges that Article 4 of the Prime Contract is applicable to the Subcontract and provides a maximum markup of 21% for change order proposals, which the jury award exceeded. Perini alleges that the verdict should be set aside "because Steelco has been overpaid for the extra work"and that Steelco's work was not properly valued (Def. Memo. Of Law, p. 7). Perini further alleges that Steelco's extras are speculative and based upon unsubstantiated or speculative estimates. Perini claims that Steelco should not be permitted to recover damages based upon estimates rather than actual costs of the extra work, and that should any redesign change resulting from the completion of the preliminary plan result in the increase or decrease of Steelco's base Subcontract work, any such change would be evaluated in accordance with the Steelco Schedule of Values.

Steelco contends that the "schedule of values" that Perini references provides no guidance

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and/or describe all work necessary for full compliance with the intent of the Contract. The Subcontractor understands and agrees that the preliminary plans and specifications will be supplemented and/or replaced by final plans and specifications prepared by the Contractor's Architect-Engineer (STV) or their subconsultants. The Subcontractor agrees that its work and materials will conform to such final plans and specifications.

"The Subcontractor understands that there may be redesign changes that would increase or decrease the monetary value of this Subcontract. There will be a mutual agreement between the Contractor and the Subcontractor in evaluating this change, using the agreed Subcontract breakdown of its work as a guide to determine the change. Payment for Owner changes to the Subcontractor's work shall be as and in the amount approved by the Owner. In the event of any dispute between the Contractor and the Owner with respect to the change or value of the change, Subcontractor shall be paid for such change as if said changes were a Contractor change. Changes made directly by the Contractor shall be mutually agreed to between the Contractor and Subcontractor." (Subcontract, Exhibit A, para. 5).

towards valuing the cost of extra steel work. Steelco contends that Perini's allegation that change order proposals are only compensable if computed in accordance with a schedule of values or trade payment breakdown, is not set forth in either the prime or sub-contract. The record reflects that the Subcontract provided for payment to Steelco for extra work arising from changes to Steelco's work.

Steelco responds the extra work proposals it submitted to Perini were detailed and consistent with the prime and Subcontracts, as well as standard industry practice. The record reflects that Steelco's valuation of extra work was submitted to Perini in the manner required by the changes provision of the Prime Contract. The record reflects that Steelco submitted an itemized, detailed estimate of the labor and material costs and labor rates for each component of extra work for each change order proposal in question. The record reflects that the extras are estimates of the scope and price of the work before actual performance so that Perini will know what it will cost. The record also reflects that Steelco cannot and does not keep separate time cards for extra work because it is impossible to separate out the work associated with the base contract from extra work in the fabrication process.

It is well-settled that a motion to set aside a jury verdict shall not be granted unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence (*Baker v Turner*, 200 AD2d 525 [1st Dept 1994]; *Lolik v Big V Supermarkets*, 86 NY2d 744[1995]). There must be simply "no valid line of reasoning and permissible inferences" which could possibly lead rational persons to the conclusion reached by the jury on the basis of the evidence at trial (*Cohen v Hallmark Cards, Inc*, 45 NY2d 493 [1978]). In reviewing the jury verdict for sufficiency, the evidence is

examined in the light most favorable to the prevailing party, that is, the plaintiff in this case (*Baker v Turner*, *supra*). If there was conflicting evidence, the Court may not substitute its own, or the moving party's, judgment in place of the verdict if the verdict was one in which reasonable people could have rendered after reviewing the conflicting evidence in favor of one party (*Dobess Realty Corp v City of New York*, 79 AD2d 348 [1st Dept 1981]). Perini also seeks to aside the jury's verdict on damages as against the weight of the evidence. It is well settled that a jury verdict should not be set aside as against the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (*see Hospodar-Anikin v City of New York*, 12 AD3d 405 [2004]; *Nicastro v Park*, 113 AD2d 129 [1985]).

This Court finds that the plaintiff provided evidence at trial of the proper valuation of the work it performed and it cannot be said that the jury's verdict was irrational. Perini's argument to preclude Steelco from offering evidence regarding its valuation of the Steelco extra work claims on the grounds that the Subcontract requires the changes to be valued in accordance with a trade payment breakdown was raised twice during trial and denied by the Court. The record reflects that Steelco's valuation of its extra work was submitted to Perini in the manner required by the Prime Contract, including submission of an itemized, detailed estimate of the labor and material costs and labor rates for each component of the extra work for each change order proposal at issue.

Evidence was presented at trial that Steelco's extra work proposals were consistent with the Prime and Subcontract, as well as with industry practice. Testimony was also presented that Perini never asked Steelco to submit the bills for these change orders other than in the form that was submitted by Steelco, and that Perini did issue eight change order proposals based on

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Steelco's valuation (Transcript, p.648). The Subcontract contained a clause which expressly contemplated how Perini would pay Steelco for extra work arising from changes to Steelco's work from that required by the original bid documents. This clause is contained in Article 5 of the Subcontract entitled "Scope of work" (*see* footnote 1). Perini argues that this clause mandates the application of a schedule of values in valuing the cost of the extra work. Steelco argues that clause only mandates mutual agreement between the contractor and the Subcontractor in evaluating redesign changes, using the schedule of values only as a guide in trying to reach agreement. Steelco further argues that changes made directly by the contractor "shall be mutually agreed to between the Contractor and Subcontractor" with no reference to using the schedule of values as a mandated or recommended guide. Perini's conclusory allegation that "Article 5 just provides for valuing the work as identified in the completed design on the same basis that the parties valued the work as identified in the preliminary design as reflected in the lump sum price set forth in the Subcontract" is not supported by the record. Neither the prime nor Subcontract provide that change order proposals are only compensable if computed in accordance with a schedule of values of trade payment breakdown.

Extensive testimony was presented at trial that detailed how Steelco evaluated each change, breaking down the valuation into detail, by material, by labor, and by equipment (Transcript, pp. 323-325). Testimony reflects that Steelco's method of evaluation included assessing the amount of steel that was being added or eliminated by the design change (Transcript, p. 321), looking at the type of material involved to determine pricing, and assessing whether that material was being added or eliminated. The record reflects that "every single item, a value was put on it, a weight was put on it, either it took half an hour to fabricate or an hour to

fabricate." (Transcript, p. 647). By contrast, Perini's valuation did not evaluate in detail but simply took the lump sum of material or the lump sum of the fabrication and divided it up by the area in the building, which, while useful for approximating the progress of the work at a given time, was not intended as a way of valuing extras (Transcript, pp. 325-326).

Contrary to Perini's arguments that a fixed unit price for the material should have been applied, the record further reflects that the material varied in prices and cost, and that the contract was a lump sum, not a unit price, contract (Transcript, p. 448-450). The record reflects that the original bid design required 301 steel columns and 2,704 beams. With respect to the 21 extras at issue in this trial, there were no new columns added and only a net of 15 beams were added. The bulk of the changes in the amount of $2,094,202 relates to the perimeter of the building with respect to the lintel system to support the skin of the building. None of this perimeter steel work was included in the original design and was mainly consisting of tubes, outriggers and lintels, none of which was part of the trade payment breakdown which Perini is arguing should have been the basis for valuing the extra work. Record further reflects that there was no discussion regarding use of a unit price analysis by Perini prior to this litigation (Transcript, p. 648).

Perini argues that it is entitled to judgment as a matter of law because the jury award of damages is not based upon actual costs but on estimates which are unreliable. The cases cited by Perini are inapposite, as they involve delay damages or uncompensated home office overhead, issues which are not present here. Here, the issue involves the pricing of Perini directed changes which are governed contractually.

Perini further asserts that the jury verdict with respect to Change Order Proposals X-22A, X-23 and X-32A should be set aside because these are "delay claims" which were dismissed by a

prior order issued by Justice Cahn. While the plain language of Justice Cahn's decision dated November 30, 2004, dismissed all proposals for delay claims, it fails to hold that Change Order Proposals X-22A, X-23 and X-32A were in fact delay claims. Should the movant seek clarification of Justice Cahn's decision, the movant may seek its relief before Justice Cahn.

Perini further contends that Steelco is not entitled to final payment until its work is accepted by the MTA, quoting a portion of section 9 of the Subcontract. Upon examining section 9 of the Subcontract in its entirety, this Court finds that the provision upon which Perini relies is inapplicable. Sections 9.1 describes the circumstances when the contractor may provide labor, materials, etc., and deduct the cost thereof, upon providing a 72-hour notice. Section 9.2 describes the circumstances when the contractor may terminate the Subcontractor's employment, after providing a written 5 days notice to the Subcontractor. Immediately following Section 9.2 is Section 9.3, which states "[i]f Contractor *so terminates* the employment of the Subcontractor, Subcontractor shall not be entitled to any further payments under this agreement until Subcontractor's work has been completed and accepted by Owner . . . [emphasis added] (Subcontract section 9.3). Section 9.4 permits the Contractor to terminate without the Subcontractor being at fault, upon written notice, and requires payment to the Subcontractor for the work actually performed. Examining Section 9 as a whole, this Court finds that Section 9.3, which Perini relies on in asserting that it can withhold payment absent Owner approval, only applies if the Contractor was terminated under the circumstances described in the immediately preceding section 9.2. Section 9.2 permits termination when the Subcontractor "refuses or neglects to supply properly skilled workmen [*sic*], or materials or equipment of the proper quality and quantity, or fail in any material respect to prosecute the work with promptness and diligence,

or cause by any action or omission and stoppage or interference with the work of the Contractor or other Subcontractors, or fail in the performance of any of the material covenants herein contained, or be unable to meet his debts as they mature . . ." (Subcontract, sect 9.2). Perini fails to establish what testimony, if any, was offered at trial to demonstrate that Steelco was terminated under the circumstances described in section 9.2, and fails to demonstrate when and if the requisite 5 days notice was served by Perini. This Court finds that Perini has not met its burden in presenting a sufficient showing of the record presented at trial to support this allegation.

Perini's remaining arguments, including its application for a new trial in the interest of justice, have been reviewed and are denied as without merit.

Motion to Amend Verdict to Add Interest, et. al.

Steelco brings its motion seeking to amend the jury verdict to add pre-judgment interest, post-judgment interest, and attorneys' fees and costs.

The plain language of CPLR 5001(a) mandates the award of interest to verdict in breach of contract actions (*Spodek v Park Property Development Assoc.*, 96 NY2d 577, 581 [2001]). CPLR 5001(b) provides that said "interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred." There is a "long-standing recognition that the purpose of awarding interest is to make an aggrieved party whole" (*Id.*). Steelco contends that the earliest ascertainable date interest on the unpaid contract balance of $576,441.00 should accrue from November 6, 2001, the date of completion of the work by Steelco and *de facto* acceptance of the work by Perini and the MTA. Perini argues that Steelco is not entitled to any prejudgment

interest because Steelco is not entitled to be paid until the MTA accepted its work and paid Perini. While there was no formal written acceptance issued by the MTA, Steelco contends that acceptance of Steelco's work was evidenced by: Perini's proceeding with the work of subsequent trade contractors, including pouring concrete over Steelco's structural steel work and constructing the remainder of the building upon the structural steel; the substantial completion of the project; and MTA's current use of the constructed facility for its buses, which was the project's intended use. This Court agrees and grants Steelco's application for prejudgment interest on the unpaid balance accruing from November 6, 2001. Prejudgment interest on the change order proposals is also granted and accrues, in the absence of any specific contractual provision in the Subcontract, 30 days after each of the 21 change order proposals was submitted to Perini. Steelco is also entitled to post-judgment interest from the date of the verdict through the entry of judgment (see CPLR 5002), and said judgment shall also bear interest from the date of its entry until such time as the judgment is paid (see CPLR 5003).

Steelco further seeks attorneys fees and costs pursuant to the Subcontract. It is well-settled that a prevailing party may not collect attorneys' fees and costs unless such an award is specifically authorized by an agreement between the parties (*Hooper Assoc., Ltd., v AGS Computers, Inc.,* 74 NY2d 487 [1989]). It is undisputed that the Subtract contains a contractual provision for attorneys' fees and costs to be paid by "the party which loses" [Subcontract, Exhibit M, para. 6.1]. Perini contends that . . . "In order to justify an award of contractual attorneys' fees, the court need not adopt each claim raised in a lawsuit" (*Board of Managers of 55 Walker Street Condominium v Walker Street, LLC*, 6 AD3d 279, 280 [1st Dept 2004]). Rather, the claimant must be the prevailing party on the central claims advanced, and receive substantial

relief in consequence thereof (*Id.*). An initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope, is useful in determining who is the prevailing party (*Excelsior 57th Corp v Winters*, 227 AD2d 146, 147 [1st Dept 1996]). Here, while the jury granted a substantial part of the relief requested based on many of plaintiff's claims, the plaintiff did not prevail on its claims based on delay, which were dismissed prior to trial by Justice Cahn. Accordingly, this Court finds that reasonable counsel fees and costs are awarded on the claims to which the plaintiff prevailed, including the claims raised at trial. "In determining the appropriate value of an attorney's services in arriving at a reasonable fee, the court should consider, *inter alia*, the difficulty of the question involved, the skill required to handle the problem, and the amount of time expended on the case" (*Sobol v Wykagyl Pharmacy, Inc.*, 282 AD2d 438 [2d Dept 2001]). This matter is referred to a Special Referee to hear and determine what reasonable attorneys fees and costs should be awarded on the claims to which plaintiff prevailed.

Conclusion

For all the foregoing reasons, it is hereby

Ordered that defendants' motion to set aside the jury verdict is denied and it is further

Ordered that plaintiff's motion to amend the jury verdict is granted to the extent provided in the decision above, and it is further

Ordered that the issue of reasonable attorneys' fees and costs is respectfully referred to a Special Referee to hear and report, upon service of a copy of this Decision and Order with notice of entry on the Special Referees Office (Rm 119).

This reflects the Decision and Order of this Court.

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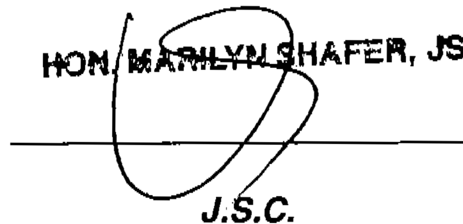
Dated: 3/28/06



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