

<b>Centre St. Sys., Inc. v 50 Broadway Realty Corp.</b>
2006 NY Slip Op 30838(U)
January 3, 2006
Supreme Court, New York County
Docket Number: 105119/04
Judge: Rosalyn H. Richter
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 24

-----X  
CENTRE STREET SYSTEMS, INC.,

Plaintiff,

-against-

Index No. 105119/04  
Decision & Order

50 BROADWAY REALTY CORP., AUSTIN  
BROTHERS, INC., a/k/a AUSTIN BROS., INC.,  
KABACK ENTERPRISES, INC., ALL STATE  
INTERIOR DEMOLITION, INC., and GELT  
LEASING CORP.,

Defendants.

-----X  
ROSALYN RICHTER, J.:

Defendant Kaback Enterprises, Inc. moves for an order granting summary judgment on its cross claims against defendant Austin Brothers, Inc. (Austin) and defendant Austin cross-moves for an order granting it summary judgment on its cross claims against defendant 50 Broadway Realty Corp. (50 Broadway) and Gelt Leasing Corp. (Gelt). Plaintiff Centre Street Systems, Inc. (Centre Street) also seeks summary judgment against defendant Austin.

This litigation involves construction work in an office space leased by Gelt and owned by defendant 50 Broadway. Austin was the general contractor on the project and Kaback and Centre were subcontractors.

Kaback alleges that it was hired by Austin, Gelt and 50 Broadway to perform duct work for the air conditioning systems at the premises. Kaback further alleges that the agreed upon price and the reasonable value of the work and material was \$43,844.00, and that it sent statements of account to Austin indicating this balance was due. According to Kaback, the invoices were received by Austin without challenge or rejection.

Although Austin contends in an affidavit submitted to this Court that it did not order the work, but rather that the work was ordered directly by the owner, it does not allege that it ever disputed the invoices or advised Kaback that it was not responsible for these bills. Indeed, a careful reading of Austin's affidavit shows that they are not claiming that no invoices were sent to them. In any event, invoices annexed to Kaback's motion show that they were addressed to Austin. Austin's retention of the invoices here without raising any objection within a reasonable period gives rise to an account stated claim. *See Nebraskaland, Inc. v. Best Selections, Inc.*, 303 A.D.2d 662 (2d Dept. 2003).

Austin also notes that the owner has claimed that Kaback's work was not done properly, though Austin itself acknowledges that Kaback's work was done correctly. The mere fact that the owner may not be willing to pay for the work at this juncture does not excuse Austin's failure to dispute the invoices when it received them. Austin does not claim that it informed Kaback when the invoices arrived that the bills should be sent to the owner. Austin also does not claim that in response to the invoices, it told Kaback that it was disclaiming any responsibility for this aspect of the job. Furthermore, Austin does not claim that it had any agreement with Kaback that Kaback would not be paid until Austin was paid. Accordingly, in the absence of any evidence that Austin raised a timely objection to Kaback's invoices, Kaback is entitled to summary judgment against Austin. *Federal Exp. Corp. v. Federal Jeans, Inc.*, 14 A.D.3d 424 (1st Dept. 2005).

Plaintiff Centre Street also is entitled to summary judgment against Austin. Centre Street alleges that, pursuant to an oral agreement with Austin, it supplied and installed drywall, acoustic tiles, plywood and hardware at the premises for the reasonable value of \$96,154.00, which Austin, Gelt and 50 Broadway agreed to pay. Centre Street further alleges that Austin paid it \$57,500.00, but that \$38,654.00 remains due and owing, and that it has sent statements to Austin for that unpaid

balance. Centre Street also alleges that Austin did not, in a reasonable time, respond to these unpaid invoices or raise any objection to them.

As with the claim by Kaback, Austin does not dispute that invoices were sent to them and does not claim that it objected to them. Austin also does not dispute that it made partial payments to Centre Street. In addition, Austin does not even argue that it did not order the work from Centre Street. Rather, Austin argues that the owner's objections to the work are sufficient to defeat Centre Street's claims against Austin. That argument is not persuasive.

Austin does not cite any persuasive authority or contractual language to support its position that it does not have to pay the subcontractors because the owner now has a problem with the work. The burden was on Austin to advise the subcontractors of any dispute in a timely manner upon receipt of the invoices. Having failed to do so, it now is liable on these claims. Thus, Centre Street also is entitled to summary judgment against Austin.

Austin, however, is not entitled to summary judgment in its favor since there are numerous questions of fact as to when Gelt questioned the cost of the work and whether the work was done properly. *See M & A Const. Corp. v. McTague*, 21 A.D.3d 610 (3d Dept. 2005). Austin contends that Gelt only objected to the quality of the work after the invoices were sent. Austin further notes that it had advised the owners to purchase new air conditioning units because the old units were not working properly. The owners refused to buy new units and the work proceeded. Thus, Austin argues it was not responsible for any alleged malfunctioning of the equipment since it had warned the owners about the problem.

However, according to Abraham Eisner, an officer of Gelt, there were numerous problems in getting the air conditioning units installed and it repeatedly complained to Austin about the situation

while the work was going on. Eisner argues that Austin, as the general contractor, was responsible for seeing that its subcontractors performed the work properly, and that Austin failed to fulfill that role. Thus, Gelt argues Austin is responsible for the defective workmanship and Gelt brought these issues to their attention in a timely manner.

Gelt also correctly notes that there are numerous questions as to the exact amount of Austin's claim. In its answer to the Amended Complaint, Austin alleges that \$62,644.00 is due and owing. Yet, in this motion, Austin contends that \$84,949.00 is due. Furthermore, according to Eisner, some of the invoices cover work which Austin did to correct the defects identified by Gelt and therefore Gelt should not pay for these items.

Eisner also contends that some of the work was not authorized. For example, Austin submits copies of invoices totaling \$56,202.00 for the installation of a third-floor ladies room and related work, which appear to be approved by Robert Peter Held. However, Eisner, on Gelt's behalf, contends that Held is an architect and that his approval of the work would not constitute approval for payment. Rather, Eisner argues that Held's role was limited to evaluating whether the proposed work was satisfactory from an architectural standpoint and would comply with all applicable laws and building codes. Eisner contends that, as senior officer of Gelt, he had to approve invoices, which he did not do for the disputed amounts here.

Accordingly, in light of the questions regarding the amount due, the quality of the work, and whether the work was objected to in a timely manner, summary judgment is inappropriate and Austin's cross-motion is denied.

Settle judgment

Jan. 3, 2006

  
Justice Rosalyn Richter