SHORT FORM ORDER

INDEX
NO.: 18625-03

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

LYNDA IRELAND,

Plaintiff,

-against-

RUDY BONILLA and FRESHPOND TREES, INC.,

Defendants.

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DECISION AFTER TRIAL

Factual Background

On February 26, 2002, plaintiff, Lynda Ireland, and defendants, Rudy Bonilla and Fresh Pond Trees, Inc., entered into a written contract that provided defendants would supply and plant trees on plaintiff's property located in Sag Harbor, New York; furnish labor and stone for a driveway on the same property; and supply dumpsters to remove garbage and other items from the house. The plaintiff agreed to pay defendants the estimated sum of $50,000 for their materials and services and a bonus in the amount of $100,000 within 10 days after the property was sold.

In March 2002, defendants began work at plaintiff's property and, shortly thereafter, filed a mechanics' lien against the property. After discussions with plaintiff, defendants removed the mechanics' lien in April 2002 and continued working. In January 2003, plaintiff entered into a contract for the purchase of another house located in nearby Noyac, New York. She alleged that she intended to finance the purchase of the new house with a private loan secured by the Sag Harbor property, which remained unsold. Just prior to the closing of title on the new house, it was discovered that, on February 28, 2003, defendants filed a second mechanics' lien on the Sag Harbor property. Plaintiff contends that the lender would not provide financing for the Noyac property unless the mechanics' lien on the Sag Harbor property was cancelled. When defendants refused plaintiff's request that the mechanics' lien be removed, she was able to obtain alternate financing, albeit at a higher interest rate.

Procedural History

In August 2003, plaintiff commenced this action alleging five causes of action against defendants. The first cause of action alleges that defendants improperly filed a mechanics' lien against her property, wrongfully ignored her demands to remove the lien and, as a result, plaintiff was damaged by being required to pay a higher interest rate on the loan to purchase her Noyac house. The second cause of action is for a declaration that defendants' mechanics' lien is improper and should be vacated. The third cause of action alleges that the value of plaintiff's property has been diminished because 30 of the 18-foot evergreen trees planted by defendants died shortly after planting and because defendants never completed work on the driveway. The fourth cause of action alleges that defendants failed to comply with plaintiff's requests for a detailed invoice of the work done, that no itemization and/or warranty was ever given to plaintiff, that the materials and labor allegedly supplied by defendants were worth significantly less than the price charged, and that plaintiff was defrauded as to the cost of labor under the contract. The fifth cause of action is asserted against defendants' counsel for the filing of and refusal to remove the purportedly improper mechanics' lien.

By their answer, defendants asserted affirmative defenses alleging that their agreement with plaintiff was for a contract price of $150,000, that plaintiff acted in bad faith in refusing to sell the Sag Harbor property when the work was completed, that plaintiff failed to follow the exclusive remedies under the Lien Law § 19, and that plaintiff's fraud claim does not sufficiently state the circumstances constituting fraud as required by CPLR 3016[b]. Defendants also asserted a counterclaim seeking foreclosure of their mechanics' lien on plaintiff's Sag Harbor property.

By so-ordered stipulation dated May 11, 2004 (Emerson, J.), the parties agreed to discontinue the cause of action against defendants' counsel and to amend the caption accordingly. By order dated November 17, 2004 (Emerson, J.), the Court granted plaintiff's motion for summary judgment and dismissed defendants' counterclaim. At the same time, the Court searched the record and granted summary judgment to defendants dismissing plaintiff's first and second causes of action. By order dated April 13, 2005 (Emerson, J.), the Court granted defendants' motion for leave to renew and reargue the plaintiff's prior motion for summary judgment and, upon reargument, denied plaintiff's motion for summary judgment and reinstated defendants' counterclaim.

The action proceeded to trial on the plaintiff's remaining causes of action and on defendants' counterclaim on September 18 and 19, 2006, before this Court without a jury. On the initial trial date, plaintiff failed to appear, and defendants moved for an order of default or, in the alternative, for summary judgment. Defendants' motion was referred to the trial of the action.

Summary of Trial Testimony

Lynda Ireland

Plaintiff testified, in pertinent part, that she owned the subject premises for approximately ten years. When she decided to sell it, she wanted to use landscaping to screen out the neighboring properties, which she believed to be less desirable than her own. Plaintiff was referred to defendant Rudy Bonilla by a mutual acquaintance who told her that Mr. Bonilla would do the work inexpensively. When she met with Mr. Bonilla, he agreed to plant tall evergreens on

the east and west borders of the property, to supply labor and materials to improve the driveway, and to supply dumpsters to remove garbage and other items from the house. The estimated cost of this work was approximately $50,000. Mr. Bonilla knew that plaintiff could not afford to pay him until the house was sold and that she did not know when that would happen. They executed a written agreement on February 26, 2002, the terms of which provided that defendants would do the agreed-upon work for which plaintiff would pay them $50,000. Plaintiff also agreed to pay defendants $100,000 within 10 days after the sale of the house if they waited until the house was sold for payment. In exchange, defendants agreed not to put a lien on the house.

In March 2002, Mr. Bonilla wanted to begin work. Since plaintiff was away on business, she asked her friend Judy Ann Fayyez, the owner of Serendipity Landscaping and Design, to oversee Mr. Bonilla's work. When plaintiff returned five days later, the work was done, but she was not satisfied with it because, inter alia, the trees were in very shallow holes with the root balls in burlap and tied tightly with rope. When she brought this to Mr. Bonilla's attention, he told her that the rope and burlap would eventually rot away. Although she asked him many times for an invoice, he never gave her one. Mr. Bonilla had previously done minor projects for her at other properties she owns, and she was satisfied with his work. She had paid him in cash for his past work, but never got any invoices or receipts.

Plaintiff identified a series of photographs (plaintiff's exhibit 6) depicting the trees the defendants planted of which approximately 90 percent were dead. She could not remember, however, when the photographs were taken. She testified that she tried to notify Mr. Bonilla regarding the trees that had died, but he never returned her telephone calls.

Plaintiff testified that defendants initially filed a mechanics' lien against her property on April 16, 2002, which was later removed at her request. She discovered that defendants placed a second lien on her property in February 2003, when she was ready to close on the purchase of her new home. She intended to finance her new home by borrowing against the subject premises, but could not do so because of defendants' lien thereon. Although she was able to close on her new home by using alternate financing, the interest rate was approximately 3 percent higher.

Plaintiff identified a document (plaintiff's exhibit 4) prepared after the commencement of this action upon a joint inspection of the property conducted by counsel for both parties, which she attended. During the inspection, plaintiff identified 33 trees she believed had been planted by defendants. She also identified a document (plaintiff's exhibit 5) from one of the defendants' competitors, Farm Direct, that purportedly reflected lower prices for trees comparable to the ones defendants had planted.

On cross-examination plaintiff acknowledged that the contract provided she would pay defendant Rudy Bonilla approximately $50,000 and another $100,000 if he waited for the house to be sold. She also acknowledged that the house was in foreclosure when the work was done because she had failed to make the monthly payments on the mortgage. Although she testified on her direct examination that defendants had planted 33 trees on her property, she acknowledged that she testified at her deposition that they had planted 37 trees. She also acknowledged that defendants had planted holly bushes on her property, but asserted that they were of poor quality. She further acknowledged that defendants had supplied dumpsters for the property.

Plaintiff testified on cross-examination that she initially listed the property for sale at $1.4 million and received an offer to purchase it for $900,000. She later increased the price to $1.6 million. The house was listed for sale until 2004, when she removed it from the market. As for the purchase of her new home, she explained that she had intended to obtain the money from a "hard money lender" (a private financier) by using the subject property as security, but that the lender would not extend her financing when he discovered the mechanics' lien on the property. She was using a "hard money lender" because she had bad credit as a result of the foreclosure of the subject property.

Plaintiff also testified on cross -examination that she moved out of the subject house in February 2002 and that the house was empty until she moved back into it one year ago. She admitted that she did not have any documentation with her to support her contention that the driveway was installed by someone else. She conceded that less than 90% of the trees planted by defendants died and that trees can die if not properly watered.

On redirect, plaintiff testified that she did not accept the $900,000 offer for the property because she had invested more than $900,000 in it.

Rudy Bonilla

Defendant Rudy Bonilla testified that he has been employed as a nurseryman and has operated Fresh Pond Trees, Inc., of which he is president, since 1998. He studied horticulture for two years and received training about transplanting trees at the Cornell Cooperative Extension in Riverhead, New York. He was introduced to the plaintiff in 2002 by a mutual friend. The plaintiff asked him to do landscaping work on her property in February 2002. She told him that she needed screening, which required the planting of large trees along the perimeter of the property. They came to an agreement that, because she did not have the money to pay him at the time, he would do the work and she would pay him when she sold the house approximately three months later. It took him about three weeks to prepare the trees to be moved from his farm to plaintiff's property. This required balling the trees, which included White Pines, Blue Spruces and Norwegian Spruces, and wrapping them in burlap. Eighty percent of the plantings came from his farm, but the small bushes, such as the holly and berry plants, were purchased by him elsewhere.

When he planted the trees in 2002, they were in good condition. He continued to visit plaintiff's property periodically over the following eight months. When he went back to check on the trees, he watered them because plaintiff's sprinkler system did not reach the perimeter of the property and she was not giving them the eight gallons of water a week that they needed. He told plaintiff that the trees needed more water and that she should install a soaker system to water them through the root system. When two of trees died within the initial eight-month period, he offered to replace them.

In 2004, he went with plaintiff, her attorney, and his own attorney to plaintiff's property to make an inventory and price list for the trees. The price he charged for each of the specimens included the labor for planting it. The plantings came with a one-year warranty. The prices charged for the trees and labor were 20 percent higher than if plaintiff had gone to two other local nurseries. Today, the larger trees, such as the Norwegian Spruces, are about 25-feet high and would cost approximately $3,500. Tree prices are substantially higher today.

In June 2006, Mr. Bonilla went back to the property and observed that

approximately 80 percent of the trees he had planted were still alive. As to Ms. Ireland's claim that the trees were not properly planted, he testified that the trees had 7,000-pound, 72- inch root balls that were wrapped in burlap and designed to disintegrate within three months. If the burlap was taken off, the trees would have to be staked to stabilize them. Leaving the burlap on had no effect on the trees' ability to root because the burlap quickly disintegrated. Mr. Bonilla made a video of the plaintiff's property during his visit there.

Mr. Bonilla testified that he also worked on the driveway. Using a tractor, he took sand off the driveway and replaced it with 60 yards of crushed concrete. He paid $11,000 for the crushed concrete and the dumpsters to take away the debris that had accumulated in the basement. Mr. Bonilla identified an invoice (defendant's exhibit B) from Norsic Sanitation Services reflecting that it had been paid $11,000 for the crushed concrete and container services at plaintiff's property.

After he finished the work at plaintiff's property, Mr. Bonilla telephoned and tried to speak with plaintiff approximately eight times. It was not until he filed a mechanics lien that she responded to his telephone calls. Plaintiff told him that she was trying to refinance the property, but that she could not do so with the lien on it. She promised to pay him if he removed the lien. She acknowledged that she owed him $150,000. Although he removed the lien, plaintiff did not pay him and began avoiding his telephone calls again. As a result, he filed another lien. He never heard from plaintiff again, and she never complained that she was dissatisfied with the work he had done installing the trees. He has not received any payment for the work he did at plaintiff's premises.

On cross-examination, Mr. Bonilla testified that the work on plaintiff's property was primarily done by him and his brother. At times, Mr. Bonilla's "investor," Pierre Wulff, helped. Mr. Wulff advanced Mr. Bonilla approximately $25,000 for the project. He confirmed that plaintiff said that the house would be sold in about three months.

Pierre Wulff

Non-party witness Pierre Wulff testified that he is a perfumier and a licensed real estate agent. He has been working with defendants for approximately 10 years. Mr. Bonilla planted some 120 trees on Mr. Wulff's property, and Mr. Wulff testified that he has always been satisfied with defendants' work. Mr. Wulff invested approximately $25,000 in the work Mr. Bonilla did at plaintiff's property. He was at the site many times while Mr. Bonilla was working there. He advised Mr. Bonilla on the placement of the trees so as to provide the best screening. When Mr. Wulff first visited the property, there was no real driveway. Defendants installed crushed cement or stone for the driveway. The trees defendants planted on plaintiff's property were perfectly good trees. The quality of defendants' trees was comparable to those of big companies, but at a lower price.

On cross-examination Mr. Wulff admitted that he has no experience or education in horticulture that would qualify him as an expert witness and that he was merely expressing his personal opinion regarding the quality of the trees supplied by defendants.

On rebuttal, plaintiff testified that the video shown by defendants did not accurately represent her property. The video showed the same portion of the property many times. It did not show the section where many of the dead trees are located, and the trees indicated by Mr. Bonilla were not actually planted by him.

Legal Arguments

In rendering its determination, the Court has considered the pleadings, the defendants' motion for an order of default or summary judgment, the testimony of each of the trial witnesses, the trial exhibits, and the post-trial memorandum of law submitted by defendants.

Plaintiff's counsel made no opening statement and no closing argument at the trial, and plaintiff has apparently declined the Court's invitation to submit a post-trial memorandum of law. In opposition to defendants' motion for an order of default or summary judgment, plaintiff does not dispute that defendants performed work at her property, but she disputes the quality and quantity of the work performed.

Defendants contend that plaintiff, a real estate broker, and owner of several properties including the subject property, wanted to market the property, but that it required the addition of landscape screening, the installation of driveway surface material, and the removal of several dumpsters' worth of debris that had been allowed to accumulate in the house. Defendants also contend that, because plaintiff did not have the money to finance these improvements, she entered into a written agreement with Mr. Bonilla pursuant to which defendants would supply materials and perform services worth approximately $50,000. In addition, defendants would forbear payment for their materials and services until plaintiff sold the house, when she would pay them $150,000. Defendants performed according to the parties' agreement and advised plaintiff when the work was done. Plaintiff did not respond to defendants' demands for payment and failed to market the property. As a result, defendants filed a mechanics lien against the property, which plaintiff asked them to remove so that she could sell the property or refinance it. Plaintiff promised defendants that she would pay them $150,000 if they removed the lien. They complied, but plaintiff did not pay them and took the property off the market.

Findings of Fact and Conclusions of Law

Plaintiff's fraud claim is dismissed. To sustain an action for fraud, plaintiff must prove by clear and convincing evidence that a representation of a material fact was made, that such representation was false and known to be false by the party making it or was recklessly made, that such representation was made to deceive and to induce the other party to act upon it, and that the party to whom the representation was made relied upon it to its injury or damage (**Orbit Holding Corp. v Anthony Hotel Corp.,** 121 AD2d 311, 503 NYS2d 780 [1986] *citing* **Jo Ann Homes at Bellmore, Inc. v Dworetz,** 25 NY2d 112, 302 NYS2d 799 [1969]; **Simcuski v Saeli,** 44 NY2d 442, 406 NYS2d 259 [1978]). A claim for damages for fraud does not lie, however, when the only fraud alleged relates to a breach of contract (**Melissakis v Proto Construction & Development Corp.,** 294 AD2d 342, 741 NYS2d 731 [2002]; **Jackson Heights Medical Group, P.C. v Complex Corporation,** 222 AD2d 409, 634 NYS2d 721 [1995]). A cause of action sounds in tort rather than contract only when the legal relations binding the parties are created by the utterance of a falsehood, with fraudulent intent and reliance thereon, and the cause of action is entirely independent of contractual relations between the parties (*see,* **Lee v Matarrese,** 17 AD3d 539, 793 NYS2d 457 [2005]). Applying these principles to the present case, the Court finds that plaintiff has failed to prove that defendants made a material representation concerning an intention to perform a duty that was collateral or extraneous to the parties' contract **(Id).** Moreover, the damages that plaintiff seeks to recover are the same damages that are recoverable for breach of contract **(Id).**

As a general rule, the terms of a written agreement define the rights and obligations of the parties to the agreement. The fundamental objective when interpreting a written contract is to determine the intention of the parties as derived from the language employed in the contract. When the parties have agreed to conduct themselves in accordance with the rights and duties expressed in a contract, the court should strive to give a fair and reasonable meaning to the language used (**Abiele Contracting, Inc. v New York City School Construction Authority,** 91 NY2d 1, 666 NYS2d 970 [1997]). It is well settled that "in seeking for the intent of the parties the fact that a construction contended for would make the contract unreasonable may be properly taken into consideration. A court will endeavor to give the construction most equitable to both parties instead of the construction that will give one of them an unfair and unreasonable advantage over the other" (**Fleischman v Furgueson**, 223 NY 235, 241, 119 NE 400 [1918]; *see*, **Haskin v Mendler**, 184 AD2d 372, 584 NYS2d 851 [1992]; **Hsieh v Pudge Corp.**, 122 AD2d 198, 505 NYS2d 163 [1986]; **Nassau Chapter, Civil Serv. Empls. Assn. v County of Nassau**, 77 AD2d 563, 430 NYS2d 98 [1980], *affd* 54 NY2d 925, 445 NYS2d 152). Further, a court may not write into a contract conditions that the parties did not insert by adding or excising terms under the guise of construction, and a court may not construe the language used in such a way as would distort the contract's apparent meaning (*see*, **Salmow v Del Col**, 79 NY2d 1016, 584 NYS2d 424 [1992]; **Matter of Kalman v Kalman**, 300 AD2d 487, 751 NYS2d 578 [2002]; **Cohen-Davidson v Davidson**, 291 AD2d 474, 740 NYS2d 68 [2002]; **Matter of Scalabrini v Scalabrini**, 242 AD2d 725, 662 NYS2d 581 [1997]).

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance (**Dalton v Educational Testing Service,** 87 NY2d 384, 639 NYS2d 977 [1995]; *see also,* **Collard v Inc. Village of Flower Hill,** 75 AD2d 631, 427 NYS2d 301 [1980] *affd* 52 NY2d 594, 439 NYS2d 326). The implied covenant of good faith encompasses any promises that a reasonable person in the position of the promisee would be justified in understanding were included in the agreement and prohibits either party from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract (**1-10 Industry Assocs., LLC v Trim Corporation of America,** 297 AD2d 630, 747 NYS2d 29 [2002]). The implied covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive benefits under their agreement (**Aventine Investment Management, Inc. v Canadian Imperial Bank of Commerce,** 265 AD2d 513, 697 NYS2d 128 [1999]).

When a promisor himself is the cause of the failure of performance of a condition upon which his own liability depends, he cannot take advantage of the failure (**Kaplon-Belo Assocs., Inc. v Tae Hee Kim,** 145 AD2d 413, 535 NYS2d 95 [1988] *app den* 74 NY2d 615, 549 NYS2d 960). A party to a contract cannot insist upon the fulfillment of a condition when he has been the cause of its nonperformance and the result would prove unreasonable and inequitable (***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [1988]; **Collins Tuttle & Company, Inc. v Ausnit,** 95 AD2d 668, 463 NYS2d 219 [1983] *app dism* 60 NY2d 644).

Applying these principals to the matter at hand, the Court finds that plaintiff has failed to establish that she bears no responsibility to pay for the materials and services performed by defendants because she has not yet sold the property. Implicit in the parties' agreement was the understanding that plaintiff would make a good-faith effort to sell the property within a reasonable

time after defendants completed their work, as evidenced by her representation to defendants that the property would take about three months to sell. Plaintiff received an offer of $900,000 for the property, but adduced no expert evidence to support her contention that this offer was not a reasonable price. Even assuming that the sale of plaintiff's property was a condition precedent to defendants' right to payment for their services, plaintiff is not entitled to judgment in her favor since the evidence establishes that she removed the property from the market in 2004.

Plaintiff's claims that defendants are not entitled to payment because they breached the contract by not performing all of the work required by the agreement, by providing materials of inferior quality and insufficient quantity, and by providing workmanship of inferior quality. However, plaintiff failed to adduce any expert evidence to support her claim that the plants supplied by defendants were of poor quality and improperly planted. The photographs adduced by plaintiff that purportedly demonstrate that the plants died shortly after planting are of no probative value because plaintiff did not testify as to when they were taken. The documentary proof adduced by plaintiff to demonstrate that the plants were overpriced was not properly authenticated and is also without probative value. The Court found plaintiff's own testimony regarding these matters to be lacking in credibility. Finally, plaintiff offered no proof of her alleged damages, to wit, that the value of the property was reduced as a result of defendants' purported breach of contract. The plaintiff's contract claims are, therefore, dismissed.

Lien Law §3 provides, in relevant part, that any contractor "who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent * * * shall have a lien for the principal and interest, of the value, or the agreed price, of such labor * * * or materials upon the real property improved." In an action to foreclose a mechanics' lien, the burden is on the lienor to prove that he performed the agreement that is the basis of the lien. The lienor must establish his due performance of the contract by a fair preponderance of the evidence, and this burden is not changed by the fact that the lienee asserts a claim for damages due to improper materials and defective workmanship (**Clearwater Excavating Corp. v JZG Resources, Inc.,** 213 AD2d 923 , 624 NYS2d 69 lv appeal den 86 NY2d 709, 634 NYS2d 443 [1995]). Upon foreclosure of a mechanics' lien, the lienor should be awarded the agreed-upon price or the reasonable value of the labor performed or materials furnished less any payments received on account (**Rainbow Elec. v Bloom,** 132 AD2d 539, 517 NYS2d 273 [1987]).

After careful consideration of all of the matters alleged, the quality of the evidence adduced, and the relative credibility of each of the witnesses who testified, the Court concludes that defendants established their due performance of the parties' contract by a fair preponderance of the evidence, that they are entitled to full payment of the agreed-upon price ($150, 000 plus interest), and that the mechanics' lien filed against plaintiff's property is valid. Accordingly, the complaint is dismissed, and the Court finds in favor of defendants on the counterclaim. The motion by defendants for an order of default or summary judgment is denied as academic.

Submit judgment of foreclosure and sale.

HON. ELIZABETH HAZLITT EMERSON

DATED: April 9, 2007

J. S.C.