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Short Form Order

Index Number: 5165-2002

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

Hon. Emily Pines
Justice

Motion Date: 12-08-2006
Submit Date: 01-25-2007
Motion No.: 013 MOTD

Cross Motion Date: 12-08-2006
Submit Date: 01-25-2007
Cross Motion No.: 014 MOTD

X

OAKWOOD REALTY CORP., a/k/a OAKWOOD CARE CENTER, INC.,

Plaintiff,

-against-

HRH CONSTRUCTION CORPORATION and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants,

-against-.

OAKWOOD CARE CENTER, INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, KOEHLER MASONRY CORP., ARRON HEATING AND AIR CONDITIONING, INC., and SCHINDLER ELEVATOR CORPORATION,

Additional Defendants in Counterclaim,

X

KOEHLER MASONRY CORP.,

Third Party Plaintiff,

-against-

OAKWOOD REALTY CORP., FAIRCHILD REALTY GROUP and LIBERTY MUTUAL INSURANCE COMPANY,

Third Party Defendants.

X

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ORDERED, that the motion (motion sequence number 013) by Defendant HRH Construction Corporation ("HRH") for summary judgment dismissing the Fourth Cross-Claim of KOEHLER MASONRY CORPORATION ("KOEHLER") asserted in KOEHLER's Verified Answer to Amended Answer and

Counterclaim seeking interest under **General Business Law §756** is granted; and it is further

ORDERED, that the application of Defendant FAIRCHILD REALTY GROUP ("FAIRCHILD") for summary judgment dismissing the Second Cause of Action asserted in Koehler's Third-Party Complaint seeking to foreclose on its mechanic's lien is granted; and it is further

ORDERED, that the application by Plaintiff/Third-Party Defendant OAKWOOD REALTY CORP., a/k/a OAKWOOD CARE CENTER, INC. ("OAKWOOD"), and FAIRCHILD seeking summary judgment dismissing the Third Cause of Action asserted against them in the Third-Party Complaint, seeking recovery in *quantum meruit*, is granted; and it is further

ORDERED, that the application by HRH seeking an Order directing KOEHLER to return a certain document, dated March 7, 2002, titled "HRH Construction Corporation Oakwood Care Center Request for Compensable Time Extension" is granted; and it is further

ORDERED, that the application for an award of expenses and attorney's fees is denied; and it is further

ORDERED, that the cross-motion (motion sequence number 014) of KOEHLER for partial summary judgment dismissing the First Counter-Claim of HRH and LIBERTY MUTUAL is denied; and it is further

ORDERED, that the application for sanctions is denied.

PROCEDURAL HISTORY

This action arises out of a construction contract entered into between OAKWOOD and HRH on May 19, 1999, wherein HRH was the general contractor in connection with the construction of a nursing facility. The contract provided for HRH to be paid $27,46,551 for its work and HRH obtained bonds from Defendant LIBERTY MUTUAL to secure payment for all subcontractors. On or about May 24, 2000, HRH contracted with KOEHLER for the latter to provide masonry, precast concrete plank, brick facade and structural steel, for the sum of $3,454,058.86. When a dispute arose between Oakwood and HRH over Oakwood's failure to pay

HRH the sum of $2,025,000 due under the contract, Oakwood commenced the instant action against both HRH and LIBERTY MUTUAL. HRH and LIBERTY MUTUAL asserted counterclaims for delay and other money damages and sought a judgment of foreclosure on its mechanic's lien against the subject property. HRH also named KOEHLER and the other subcontractors that had previously filed mechanic's liens against the property. Thereafter, KOEHLER asserted cross-claims against HRH and commenced a third-party suit against OAKWOOD, LIBERTY MUTUAL and FAIRCHILD, seeking damages for breach of the subcontract and a judgment of foreclosure on KOEHLER's lien. According to the papers, with the exception of the disputes involving KOEHLER, all the original parties to the action resolved their disputes by settlements in 2002. Thus, the only outstanding issues for trial appear to be KOEHLER's demand for payment and HRH's claim for delay damages. The extended procedural history of this action is set forth in the Order (OLIVER, J.) dated April 11, 2003, the Decision and Order of the Appellate Division, Second Department dated June 27, 2005 and this Court's Order dated April 21, 2006.

The Fourth Cross-Claim for Interest under GBL §756(b)(1)(b)

General Business Law Article 35-E (Construction Contracts), §756-a(3)(b)(ii) provides as follows:

> (b) The contractor or subcontractor's payment of subcontract or material supplier's interim or final payment shall be made on the basis of a duly approved invoice of the work performed and materials supplied during the billing cycle.
>
> > (ii) When a subcontractor has performed in accordance with the provisions of its construction contract, the contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to its subcontractors, the full or proportionate amount of funds received from the owner for each subcontractor's work and materials based on work or services provided under the construction contract, seven days after receipt of good funds for each interim or final payment, provided all contractually required documentation and waivers are received.

The penalty provision of **Article 35-E,** found in **§756-b(1)(b)**

states that:

> Notwithstanding any contrary agreement, if any interim or final payment to a subcontractor is delayed beyond the due date established in paragraph (b) of subdivision three of section seven hundred fifty-six-a of this article the contractor or subcontractor shall pay its subcontractor interest, beginning on the next day, at the rate of one percent a month or fraction of a month on the unpaid balance, or at a higher rate consistent with the construction contract.

The legislative history of **Article 35-E** provides that "This act shall take effect on the one hundred eightieth day [Jan. 14, 2003] after it shall have become a law and ***shall apply to construction contracts entered into on or after such date unless the construction contract is entered into as part of a construction project for which a permit or permits have been issued and work has begun on such projects prior to the effective date of this act***" (emphasis added).

The fourth cross-claim in KOEHLER's Verified Answer to Amended Answer and Counterclaim seeks 1% interest on the unpaid amount purportedly due under the subcontract pursuant to **GBL §756-b(1)(b).** HRH previously moved to dismiss that cross-claim solely on the ground that the subject project, for the construction of a nursing facility on private property, was a public works project under **GBL §756-b(1)** because it was financed by HUD, and thus the interest provision of **§756-b(1)(b)** did not apply. This Court denied the motion, holding that

> It is plainly evident that despite the reference to the HUD contract with HRH, this was a private agreement between Oakwood and HRH for the construction of a nursing facility and that HRH subcontracted with Koehler for performance of some of the work under the contract. Although HUD may have supplied funding for the project, there is no claim that the federal, state or other municipal entity or political subdivision was going to be operating the facility.... To allow a contractor to escape potential penalty because HUD provided funding for the project would contravene the clear legislative intent to foster prompt payment.

Now, HRH essentially renews its motion to dismiss the fourth

counter-claim on the ground that it has since discovered that **GBL §756** "became effective long after KOEHLER completed its work on the Project and the statute was inapplicable here." **Klein Affirmation at ¶13.** HRH argues that **GBL §756** was enacted on July 23, 2002 and became effective January 14, 2003 and that it is undisputed that KOEHLER's work on the project at issue was completed on August 19, 2000, approximately two and one-half years before the effective date of the statute. **Klein Affirmation at ¶14; Koehler Affidavit at ¶6.** Moreover, HRH argues, that the retroactive provision of **GBL §756** is inapplicable because KOEHLER's work under the contract was completed long before the statute was enacted, yet alone became effective. Thus, it argues that**GBL §756** has no application to this project for the construction of the nursing home at issue and the fourth cross-claim must be dismissed.

Koehler asserts several grounds in opposition to the motion to dismiss the claim under **GBL §756.** Initially, KOEHLER argues that since no certificate of completion of the project has been produced, there is no evidence of completion of the project, and thus **GBL §756** must apply. Moreover, KOEHLER asserts, that because a permit for the construction project had been issued and work begun on the projects, **§756** is applicable to the instant case. KOEHLER argues that the date of completion of the work pursuant to the subcontract is irrelevant, but rather that since the work on the overall project began before the effective date of the GBL section, the retroactive provision of the statute is met.

The Court agrees with HRH that **GBL §756-b** does not apply to the subcontract at issue in this case. The contract between HRH and KOEHLER was entered into on May 24, 2000 and KOEHLER, by its own admission, completed its performance under the contract on August 19, 2000, more than two years after the effective date of **GBL §756-b.** KOEHLER attempts to argue that because a permit was issued for the project prior to the effective date of the legislation that the subcontract falls within the rubric of the retroactivity provision contained within the legislative history of **Article 35-E.** Such argument is without merit. While the Court agrees that the legislative history could more clearly state that the Article is applicable to "ongoing" projects for which a permit had been issued prior to the effective date of the legislation, it strains credulity to think that the Legislature would have intended for this provision to apply to

essentially all contracts for which permits had been issued prior to the effective date, regardless of whether the project had been completed. This would leave contractors and subcontractors in the tenuous position of never fully knowing whether there liability for work performed on a completed project. Finally, since the proof of the completion of KOEHLER's performance is by KOEHLER's own admission, the Court finds the lack of any certificate of completion an unpersuasive and unavailing argument.

Based upon the foregoing, the motion by HRH to dismiss the Fourth Cross-Claim seeking interest under **GBL §756-b(1)(b)** is granted and that cross-claim is dismissed in its entirety.

THE THIRD-PARTY COMPLAINT

The Second Cause of Action of Koehler's Third-Party Complaint essentially seeks to foreclosure on a mechanic's lien filed against the subject property. In that cause of action, KOEHLER alleges that Fairchild is the owner of the subject premises, that the improvements to the property were with the knowledge and consent of FAIRCHILD and thus FAIRCHILD is liable to KOEHLER for the unpaid contract amount of $175,442.31. FAIRCHILD moves, pursuant to **CPLR §3212(e)** for summary judgment dismissing the Second Cause of Action on the ground that FAIRCHILD is neither the owner of the property nor a party with which KOEHLER had any contractual relationship, and thus, is not a proper party to this action. Movants have annexed to their papers the Notice of Mechanic's Lien, dated March 7, 2002, filed by KOEHLER, which names OAKWOOD, and not FAIRCHILD as the owner of the property.

The Third Cause of Action of KOEHLER's Third-Party Complaint seeks recovery in *quantum meruit* against OAKWOOD and FAIRCHILD for the value of the work performed by KOEHLER on the subject project. Both move for summary judgment pursuant to **CPLR §3212(e)**, to dismiss this Cause of Action on the ground that neither OAKWOOD nor FAIRCHILD were a party with which KOEHLER had any contractual relationship. Thus, since neither party was in privity with KOEHLER, and FAIRCHILD was not an owner of the property, KOEHLER cannot recover in *quantum meruit* from either of these entities.

In opposition to these arguments, KOEHLER argues that these claims

for lien foreclosure and *quantum meruit* recovery must not be dismissed based on the doctrine of "election of remedies". KOEHLER does not explain, however, how the doctrine of election of remedies circumvents the lack of privity between KOEHLER and OAKWOOD and FAIRCHILD, which otherwise bars its recovery against these entities.

The law is well settled that a subcontractor may not assert a claim for breach of contract or in *quantum meruit* against a property owner where there was no contractual relationship or privity. ***M. Palandino, Inc., v. J. Lucchese & Son Contracting Corp.***, 247 A.D.2d 515, 669 N.Y.S.2d 318 (2d Dept. 1998). A "landowner who has had the benefit of a subcontractor's services pursuant to a contractual obligation with the general contractor in a construction contract is not liable for the work done by the subcontractor unless the landowner has, in some way, agreed to pay therefor." ***Faist v. Garslip Construction Corp.***, 220 A.D.2d 718, 633 N.Y.S.2d 327 (2d Dept. 1995). ***See also, Sybelle Carpet v. East End Collaborative, Inc.***, 167 A.D.2d 535, 562 N.Y.S.2d 205 (2d Dept. 1990); ***Delta Electric, Inc., v. Ingram and Greene, Inc.***, 123 A.D.2d 369, 506 N.Y.S.2d 594 (2d Dept. 1986). Moreover, a property owner who contracts with a general contractor does not become liable to a subcontractor in *quantum meruit* unless the owner "expressly consents to pay for the subcontractor's performance. The owner's mere consent to and acceptance of improvements placed on his property by the subcontractor, without more, does not render it liable to the subcontractor." ***Perma Pave Contracting Corp., v. Paerdegat Boat and Racquet Cub, Inc.***, 156 A.D.2d 550, 549 N.Y.S.2d 57 (2d Dept. 1989) (internal citations omitted). ***see, also, Contelmo's Sand & Gravel, Inc.***, 96 A.D.2d 1090, 467 N.Y.S.2d 55 (2d Dept. 1983).[1]

Application of these established principles to the case *sub judice* demonstrates why dismissal of the Second and Third Causes of Action of Koehler's Third Party Complaint must be dismissed. KOEHLER entered into a subcontract solely with HRH; no privity of contract exists between KOEHLER and either OAKWOOD or FAIRCHILD. KOEHLER's mere filing of a mechanic's lien against OAKWOOD's property does not establish the contractual liability. ***Contelmo, supra at fn. 1.*** Moreover, in the absence of privity, KOEHLER cannot recover on a quasi-contract theory of

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[1] In ***Contelmo's supra,*** the Second Department noted that a defendant in an action to foreclose on a mechanic's lien may be held liable on a contract theory only where there would have otherwise been contractual liability. The mere filing of a mechanic's lien does not of itself create contractual liabilty.

quantum meruit. FAIRCHILD and OAKWOOD have thus met their *prima facie* burden of establishing entitlement to summary judgment dismissing these causes of action. KOEHLER has failed to raise a triable issue of fact sufficient to rebut the presumption. There is no evidence that OAKWOOD, as the owner of the property, or FAIRCHILD, expressly consented to an obligation to pay KOEHLER.

Based upon the foregoing, the applications by FAIRCHILD and OAKWOOD to dismiss the Second and Third Causes of Action of KOEHLER's Third Party Complaint is granted and they are dismissed.

PROTECTIVE ORDER

HRH also seeks an Order, pursuant to **CPLR §3101(c)** and **§3101(d)(2)**, directing KOEHLER to return to HRH a certain document, dated March 7, 2002, titled "HRH Construction Corporation Oakwood Care Center Request for Compensable Time Extension", and pursuant to **CPLR §3103(c)**, a protective Order enjoining Koehler's use of such document. In sum, HRH claims that this document was prepared in anticipation of litigation and that it was inadvertently produced during its production of more than 60 boxes of documents.

According to counsel for HRH, this document was prepared by HRH's litigation consultant, Lovett Silverman Construction Consultants ("Lovett Silverman"), that it was an internal document that was prepared in anticipation of litigation and was never disseminated outside of HRH. **Klein Affirmation at ¶18.** Klein alleges that HRH discovered the inadvertent disclosure the day after the document was sent to KOEHLER's counsel among more than 60 boxes it produced. Upon discovery of the inadvertent disclosure, Klein states that HRH counsel wrote to KOEHLER's counsel, advised that the document was privileged work product prepared in anticipation of litigation and demanded its return. According to Klein, counsel for Koehler did not respond to the correspondence and has refused to return the document.

In opposition to the motion, KOEHLER argues that the document is not immune from disclosure because it is a "multi-motivated" report and therefore not privileged. Specifically, KOEHLER argues that the Lovett report is of a type typically produced by engineering firms for

"investigatory purposes pursuant to the ordinary course of business." LaReddola Affirmation at ¶37. KOEHLER asserts that the report was undertaken by HRH for the purpose of investigating the cause of any project delays and determining the appropriate course of action, if any. KOEHLER has annexed a copy of the report to its papers for an *in camera* review by the Court. Moreover, KOEHLER argues that the most likely use of the report was to be used by HRH to request an extension of time to complete the work from OAKWOOD. KOEHLER also argues that the report finds that any delay in the project was not attributable to KOEHLER and thus it should be disclosed.

In addition to the above arguments, KOEHLER maintains that even if the Lovett document was privileged, HRH waived such privilege by its failure to exercise due diligence in the inadvertent production of a 250-page document. Finally, KOEHLER argues that the document should be discoverable, despite being privileged because KOEHLER substantially needs it in the prosecution of its case and cannot without undue hardship obtain the substantial equivalent of the report by other means. LaReddola Affirmation at p. ¶53. Specifically, they argue that the Lovett report is the only document that reflects a final schedule of work and identifies the "critical path[2] developed with existing project information such as daily reports, photos and the actual construction schedule". LaReddola Affirmation at ¶54.

In reply, HRH argues that the report at issue was prepared solely in anticipation of litigation with OAKWOOD, that Lovett was retained to evaluate and prepare a claim against OAKWOOD seeking delay damages and that the report was also prepared to assist in the defense of a claim by OAKWOOD for liquidated damages. HRH asserts that since Lovett was retained as a litigation consultant, and the document would not have come into existence but for the litigation consultancy, it was not prepared in the ordinary course of business. Additionally, HRH argues that KCEHLER has not demonstrated that it has a substantial need for the Lovett report because the factual material underlying the conclusions therein is accessible to KOEHLER by other means and without undue burden. Finally, HRH argues that it did not waive the privilege attached to the Lovett document by its inadvertent production because

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[2]The critical path is defined in the Lovett report as "the string of related construction activities through the project schedule that has the longest, cumulative time duration. This is the path upon which any delay will result in corresponding delay to the project completion date and/or critical project milestones."

it intended the document to remain confidential, it was among a voluminous response to a discovery demand, and HRH demanded the document's return within 24 hours after it was delivered, thus KOEHLER was on notice that HRH was asserting a privilege.

CPLR §3101(c) exempts the work product of an attorney from disclosure. **CPLR §3101(d)(2)** provides in relevant part that "materials otherwise discoverable. . . and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

The Appellate Division, discussing the scope of expert disclosure, has explained that "'... an expert who is retained as a consultant to assist in analyzing or preparing the case is beyond the scope of this provision;[3] in fact, such experts are generally seen as an adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure under subdivision **(3101(c)-Attorney's work product)** and, now, the 'mental impressions...' exclusion of **CPLR 3101(d)(2)** as well'". ***Santariga v. McCann***, 161 A.D.2d 320, 555 N.Y.S.2d 309 (1st Dept. 1990); ***quoting, 3A Weinstein-Korn-Miller,*** NY Civ. Prac. 3101.52a at 31-214. Recently, in ***Delta Financial Corp. v. Morrison,*** 14 Misc.3d 428, 827 N.Y.S.2d 601 (Sup. Ct. Nassau Co. 2006), Justice Warshawsky thoroughly analyzed these disclosure provisions in holding that certain documents prepared by a litigation consultant were not discoverable. In that case, the Court determined that the consultant was retained by Defendant as a "litigation consultant" who was hired by its counsel to assist in the preparation of the certain cases against Plaintiffs and thus, qualifying as exempt from disclosure under **§3101(c)**. The Court then conducted an *in camera* review of the documents at issue and determined that they were created as a result of the litigation consultant's retention or communication in furtherance of such retention, and thus, were privileged. ***Delta, supra.*** The Court further held that while in some circumstances (i.e., if the litigation consultant were designated as an expert witness at trial) **§3101(d)(1)(i)** could require certain

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[3]The reference is to **CPLR §3101(d)(i).**

discrete expert disclosure notwithstanding the privilege, it would be limited to the qualifications of the expert, the subject matter of the expert's testimony, and opinion on which expert was expected to testify, it did not require disclosure of the disputed documents.

Dated: March 27, 2007
Riverhead, New York

Hon. Emily Pines
J. S. C.