

Spazi Design, Inc. v Seaboard Surety Co.

2007 NY Slip Op 30953(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0600372/2005

Judge: Helen E. Freedman

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

PRESENT: Freedman
Justice

PART 39m

Spazi Design, Inc.

INDEX NO. 600372/05

- v -

MOTION DATE _____

MOTION SEQ. NO. 001

Seaboard Safety Company

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

APR 27 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/20/07

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 39

-----X
SPAZI DESIGN, INC.,

Plaintiff,

Index. No. 600372/2005

-against-

SEABOARD SURETY COMPANY,

Defendant.
-----X

FILED
APR 27 2007
COUNTY CLERK'S OFFICE
NEW YORK

Helen E. Freedman, J.S.C.:

In this construction contract dispute, the subcontractor Spazi Design, Inc. ("Spazi") sues the general construction contractor's surety, Seaboard Surety Company ("Seaboard"), for payments owed to Spazi for ceramic tiling it did in connection with the reconstruction and improvement of the Jacobi Medical Center Modernization Project (the "Project"). Spazi asserts claims for breach of the payment bond, quantum meruit, and account stated, and it seeks to recover the unpaid balance of its contract and delay damages.

Spazi moves for partial summary judgment on the issue of Seaboard's liability, contending that Spazi substantially performed its contractual duties, and the general contractor violated the contract's termination provision when it terminated Spazi. Although it does not sue the general contractor, Spazi contends that Seaboard, as a compensated surety, is liable for the general contractor's breach. Seaboard opposes the motion, contending that Spazi's defective and incomplete performance justified its termination, and that, at a minimum, the adequacy of Spazi's performance is a disputed factual issue that precludes granting partial summary judgment. It also avers partial summary judgment is inappropriate because the pleadings do not include allegations relating to Spazi's termination, and Spazi does not specify the causes of

action for which it seeks relief.

For the reasons stated below, the motion is denied.

Background:

The Dormitory Authority of the State of New York (“DASNY”) retained T. A. Ahern Contractors Corp. to serve as the general construction contractor (“Ahern” or the “contractor”) for the Project and Bovis Lend Lease (“Bovis”) to serve as the construction manager. Seaboard issued a labor and material payment bond to Ahern in the sum of \$23,944,000.00.

In February 2003, Ahern hired Spazi to install ceramic tile pursuant to the standard form AIA Contractor Subcontractor Agreement signed by Timothy Ahern on behalf of Ahern and Ersilia A. Laurino on behalf of Spazi (the “Subcontract”). Under the Subcontract, Ahern agreed to pay Spazi \$505,000 for completing the work. Based on the document annexed to the Subcontract, Spazi was responsible for jobs including but not limited to installing tile, waterproofing walls and floors, stock piling debris, and cleaning. Additionally, Ahern could direct Spazi to perform additional work pursuant to “extra work orders” authorized by Ahern or DASNY.

Although parties contractually agreed to substantially complete construction by January 2004, construction did not commence until January 2004 because of delays unrelated to Spazi’s performance.

DASNY paid Ahern based upon payment requisitions that Ahern submitted to DASNY. The payment requisitions relevant to this motion include application 00039 dated January 28, 2005 and application 00040 dated February 24, 2005. These applications contained a column listing individual jobs and a column listing percentages that represented the extent each job was

completed. Ahern certified the accuracy of these percentages by signing the requisition. Within three days of receiving payment from the owner, the contractor is obliged to make progress payments to the subcontractor pursuant to Article 11 of the Subcontract. Ahern has paid Spazi a total of \$414,709.91.

The Subcontract provides remedies for the contractor and subcontractor in the event the subcontractor defectively performs or the contractor wrongfully withholds payment, respectively. Section 3.4.1 provides that the contractor may deduct the reasonable cost of correcting the subcontractor's deficiencies from payments otherwise owed to the subcontractor if the contractor provides a written notice to cure and an additional written notice following the subcontractor's failure to cure. Section 4.7.1 provides that if the subcontractor has not received payment within seven days from the payment due date and the subcontractor provides seven days written notice to the contractor, it may stop working until it receives payment.

Representatives from Ahern, DASNY, Bovis, and Spazi exchanged letters concerning the jobs that Spazi had not completed. On January 24, 2005, George L. Castellanos, Ahern Project Manager, notified Ms. Laurino that Spazi had three days to complete contractual obligations. On February 7 and 8, Stephen Eckert, Ahern's Assistant Project Manager, sent letters to Ms. Laurino identifying incomplete work on the fifth, seventh, and eighth floors. In a February 11, 2005 letter, Michael Cacchio, the DASNY Project Manager, stated to Timothy Ahern that "a substantial amount of work remains to be completed by your subcontractor Spazi."

On February 22, 2005, Ms. Laurino wrote a letter to Mr. Eckert confirming that Ahern representatives had assigned her dates to complete jobs on particular floors, but she had not yet received "a punchlist with prioritized rooms to be completed with field work orders from Bovis."

On April 8, 2005, Mr. Eckert sent a letter to Ms. Laurino listing problems with floor drainage on the fourth, fifth, seventh, and eighth floors. He asked her to review the list and coordinate remedial work with Ahern's Superintendent John McCarthy.

In an April 13, 2005 letter to Ms. Laurino, Timothy Ahern stated that

pursuant to paragraph 7.2 of the subcontract between Ahern and Spazi, this shall serve as notice of Ahern's intent to terminate the subcontract absent Spazi's commencement of work in good faith, and within 7 days of receipt of this notice, to cure and correct all of its work as set forth in the Bovis Lend Lease February 7, 2005 punch list (as modified).

In an April 20, 2005 letter, Ms. Laurino indicated to Mr. McCarthy from Ahern that various problems prevented Spazi from completing its work.

In June 2005, Ahern orally terminated Spazi from the Project. On June 10, 2005, Ms. Laurino wrote a letter to John McCarthy stating that Spazi was ready willing and able to complete its work and that "if TA Ahern performs the work thru [sic] other forces, it is doing so at its own risk."

Section 7.2 governs Ahern's termination rights. Section 7.2.1 specifies the proper grounds and procedures for termination. It states:

If the Subcontractor persistently or repeatedly fails or neglects to carry out the Work in accordance with Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within seven days after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, after seven days following receipt by the Subcontractor of any additional written notice and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

Contentions and Allegations:

Spazi contends that Ahern's grounds for termination were improper because Spazi substantially performed the work. Spazi avers that the payment requisitions 00039 and 00040 that Ahern certified to DASNY establish it substantially performed its obligations under the Subcontract. These obligations allegedly included the jobs listed under numbers 155 through 172. Spazi alleges that it had performed 98% of the work by January 28, 2005 and 98.56% of the work by February 24, 2005, based on its calculation of the average of percentages referable to jobs numbered 155 through 172. Spazi contends Ahern breached the Subcontract by failing to send the requisite two written notices of termination, and that Seaboard as compensated surety is responsible for this breach. Spazi alleges that, taking into account the work Spazi performed pursuant to "extra work orders," the adjusted subcontract sum should be \$615,291 minus the cost to complete work or remedy defects.

Seaboard contends that the correspondence from January to June of 2005 demonstrate not only that Ahern, Bovis, and DASNY believed Spazi did not substantially complete its work but that Spazi itself represented that substantial portions of its jobs remained incomplete at the time of the payment requisitions and Spazi's termination. It contends that Spazi's defective performance prompted numerous written and oral notices to remedy the work. Seaboard alleges that Spazi circumvented contract obligations, hired an insufficient number of workers, and refused to remedy defects. Seaboard avers that Ahern primarily relied upon its subcontractors' representations when it certified the payment requisitions, and thus these percentages were not precise. Seaboard contends that the April 13, 2005 letter constituted sufficient written notice of an intent to terminate pursuant to Section 7.2.1. Since Spazi refused to accept service of the

April 13 notice of intent to terminate, Seaboard avers that a second written notice would have been futile.

Discussion:

The issue is whether Spazi has established that it substantially performed the contract as a matter of law. If Spazi substantially performed its contractual obligations, then Ahern did not terminate Spazi based on valid grounds,¹ and Spazi is entitled to the unpaid balance less the cost to remedy any defects. “If the inferences are certain,” substantial performance is a question of law. However, if any doubt about the subcontractor’s performance exists, the issue of whether the subcontractor has substantially performed is a question of fact. *Garofalo Elec. Co., Inc. v. New York Univ.*, 300 A.D.2d 186 (1st Dept. 2002).

Here, it is not clear that Spazi substantially performed the contract, and the evidence in the record reveals that various Spazi projects remained incomplete at the time of Spazi’s termination. Spazi’s sole basis for asserting it substantially performed the contract is its calculation of the average of percentages referable to jobs numbered 155 through 172 on the payment requisitions. However, it is not apparent from the face of the payment requisitions that Spazi was responsible solely for jobs numbered 155 through 172. Although Ahern certified that the percentages were correct in order to receive payment, in correspondence following this certification, Ahern, Bovis, DASNY, and Spazi itself acknowledged that Spazi had not yet completed various projects. Thus, Spazi is not entitled to partial summary judgment on the ground that it substantially performed.

¹ Although the Complaint does not include specific allegations about Spazi’s termination, the circumstances surrounding its termination are relevant to its breach of contract claim.

Spazi has also not demonstrated that it is entitled to partial summary judgment on the ground that Ahern orally terminated Spazi instead of sending a second letter in writing. The purpose of providing advance notice is to give the subcontractor an opportunity to cure defects. Bovis and Ahern gave Spazi ample opportunities to cure, and Ahern explicitly stated that it intended to terminate Spazi if Spazi failed to timely cure defects. Seaboard also alleges that sending a second termination notice in writing would have been futile based on Spazi's prior rejection of Ahern's written notice. The cases that Spazi cites are inapposite because they involve the contractor's failure to provide a notice to cure prior to termination. *See MCK Building Assoc., Inc. v. St. Lawrence Univ.*, 301 A.D.2d 726 (3rd Dept. 2003). Here, the April 13, 2005 letter cited the relevant termination provision and permitted Spazi to cure defects and complete performance within seven days. Thus, it constitutes sufficient written notice to cure. Whether Ahern's failure to send a second written notice constituted a breach or whether Spazi's behavior excused Ahern's conduct is a disputed factual issue to be resolved at trial.

Accordingly, it is

ORDERED that Spazi's motion for partial summary judgment is denied.

Parties are directed to call the Court at (646)-386-3275 to schedule a pre-trial conference.

The trial will begin on May 22, 2007 as scheduled.

DATED: April 20, 2007

ENTER:


Helen E. Freedman, J.S.C.

FILED

APR 27 2007

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