

Metropolitan Steel Indus. v Perini Corp.
2007 NY Slip Op 32545(U)
August 14, 2007
Supreme Court, New York County
Docket Number: 0104341/2002
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER, JSC
Justice

PART 8

Metropolitan

INDEX NO. 10434102

- v -

MOTION DATE _____

Perine

MOTION SEQ. NO. 018

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 ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *denied*
present to attached Perine

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED
AUG 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/14/07

[Signature]
HON. MARILYN SHAFER, JSC

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

METROPOLITAN STEEL INDUSTRIES,

Plaintiff,

-against-

PERINI CORPORATION, et. al.,

Defendants.

INDEX NO. 104341/02

MOTION SEQ. NO. 018

The following papers, numbered 1 to 5, were read on this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion — Affidavit — Exhibits	1
Memorandum of Law In Support	2
Memorandum of Law In Opposition	3
Replying Affirmation — Exhibits	4
Memorandum of Law In Reply	5

FILED
AUG 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that the motion by defendant Perini Corporation to vacate the Information Subpoena and Restraining Notice and/or notices served by Steelco and to Issue a preliminary injunction pursuant to CPLR § 6301 *et seq.* enjoining Steelco from serving or Issuing any further restraining notices pursuant to CPLR §5222 is denied.

Background

This action arises out of the design and construction of a multi-storied bus depot, located at 100th Street and Lexington Avenue in Manhattan, owned and operated by the New York City Transit Authority. The total contract between the City and defendant general contractor Perini Corporation was for \$88,728,800. The plaintiff, Metropolitan Steel Industries, Inc. d/b/a "Steelco", was a subcontractor to Perini, performing the fabrication and erection of the project's structural steel, pursuant to a lump sum contract.

During the course of the project, the scope of work changed and Steelco submitted change order proposals. Perini paid some, but not all, of Steelco's change order proposals and made an "interim payment" of \$1,393,000. After Steelco was terminated by Perini, it commenced the instant action to recover the unpaid balance due on its contract, a 5% retainage, and damages for unpaid extra work.

The trial by this Court in April, 2005 resulted in a verdict in Steelco's favor and, following post-trial motions, judgment was entered in the amount of \$3,131,151.11:

\$1,948,688 for the balance on the base contract (\$576,441) and the change order proposals;

\$728,448.82 for prejudgment interest through September 12, 2005;

\$240,000 for attorneys' fees and costs;

\$8,935.89 for prejudgement interest on attorneys' fees;

\$205,078.40 for prejudgment interest from September 12, 2005 to date judgment was entered, calculated at \$539.68 per day.

Steelco relied, at trial, on change order estimates to prove the value of the extra work for

which it claimed payment, submitting no evidence as to its actual costs. On appeal, the First Department rejected Steelco's contention that it was unable to segregate the costs of the extra work and held that reliance upon estimates as proof of value was improper as a matter of law. *Manshul Constr Corp v Dormitory Auth of the State of NY*, 79 AD2d 383 [1st Dept 1981]. The Court modified the jury's verdict, setting aside the award for change orders, and any prejudgment interest thereon, and ordered a new trial on the value of Steelco's extra work. The Court additionally set aside the award for attorneys' fees without prejudice to reconsideration following the retrial. The contract balance award was unaffected by the Court's decision.

Steelco initiated collection proceedings, by service of an information subpoena and restraining notice, for \$826,033.52, which it represents to be the contract balance, prejudgment interest thereon, and post-judgment interest.¹ Perini moves to enjoin Steelco's attempts to collect on the judgment on the following grounds: (1) the original judgement entered, in the sum of \$3,131,151.11, has not been modified in the Clerk's office pursuant to CPLR § 5019(b); (2) the monies Steelco seeks to attach constitute trust funds under Article 3-A of the Lien Law; and (3) Perini will be irreparably harmed if Steelco collects the judgement because the re-trial may find that Steelco was overpaid. These arguments are without merit.

The law is well settled that injunctive relief is a drastic remedy. To prevail upon a motion for a preliminary injunction, the movant has the burden of demonstrating, by clear and convincing evidence, that (1) the moving party will succeed on the merits of the action; (2) the moving party will suffer irreparable injury absent the issuance of a preliminary injunction, and (3) a balancing of equities favors the movant's position (*see* CPLR 6301); *Price Paper & Twine*

¹ Plaintiff fails to provide its calculation.

Co. v. Miller, 182 AD2d 748 [2d Dept 1992]. Perini has not satisfied any prong of this test.

Perini has not demonstrated that it has a likelihood of success on the merits. Perini argues that it will be irreparably harmed if it is forced to pay Steelco the undisputed contract balance prior to the re-trial of Steelco's claim for extra costs because, upon retrial, the jury could find that it is entitled to a refund. The first jury awarded Steelco almost \$1.4 million dollars on its claim for extra costs. Perini has failed to show, by clear and convincing evidence, that the discrepancy between Steelco's cost estimates and its actual costs is likely to be over \$1.4 million. It has failed, therefore, to demonstrate that it has an "undisputed right" to the relief sought. *Abinanti v Pascale*, 41 AD3d 395 [2d Dept 2007].

Perini has not demonstrated irreparable harm. If, upon retrial, a jury were to return a verdict in favor of Perini, Perini has failed to demonstrate that it would be unable to collect the judgment. There is no allegation that Steelco is taking any steps to secrete its assets. Moreover, and of more significance, "It is well settled that preliminary injunctive relief is not available to a party seeking money damages on a breach of contract claim." *Dinner Club Corp v Hamlet on Olde Oyster Bay Homeowners Ass'n, Inc*, 21 AD3d 777 [1st Dept 2005] Damages compensable in money, *albeit* with some difficulty, are not irreparable. *Sportschannel America Associates v National Hockey League*, 180 AD2d 417 (1st Dept 1992).

Finally, Perini has not demonstrated that the balance of equities are in its favor. Steelco has an enforceable judgement against Perini for the contract balance, plus interest, notwithstanding the failure of both parties to re-settle the docketed judgement following its modification by the First Department. A judgement becomes enforceable when it is entered, not when it is docketed. *Solow v Bethlehem*, 204 AD2d 228 [1st Dept 1994], David D. Siegel, *New*

York Practice, § 485 [4th ed 2005][“As a general rule, the judgment creditor may then [when the judgement is entered] dive into Article 52 and extract whichever devices suit her particular purpose.”] The docketing of a judgment merely creates a lien on the judgment debtor’s property, serving as notice to the public of the existence of the judgment. *Bank of New York v Nies*, 96 AD2d 166 [4th Dept 1983].

We have considered Perini’s other arguments and find them without merit. It is implausible that the business of a self-described international multi-billion dollar company will be disrupted by the satisfaction of a duly entered judgment for less than \$1 million to a subcontractor whose work was completed more than 5 years ago. And, as Perini itself acknowledges, to the extent that funds held in its accounts are trust funds under the Lien Law, they are not subject to levy or restraint.

Conclusion

For all the foregoing reasons, it is hereby

Ordered that defendant’s motion to vacate the Information Subpoena and Restraining Notice and to issue a preliminary injunction is denied.

This reflects the Decision and Order of this Court.

Dated: 8/17/07

FILED
AUG 17 2007
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HON. MARILYN SHAFER, JSC
J.S.C.

Check one: [] FINAL DISPOSITION [✓] NON-FINAL DISPOSITION