SHORT FORM ORDER

INDEX No. 04-3044
CAL. No. 07-00931-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9-13-07 (002)
8-30-07 (003)
ADJ. DATE 10-17-07
Mot. Seq. # 002 - MotD
003 - XMotD

SUPERIOR INTERIOR, INC., Plaintiff, - against - INTERNATIONAL BLIND CONTRACTORS, LTD. and PAVARINI McGOVERN, Defendants.	SUNSHINE & FEINSTEIN, LLP Attorneys for Plaintiff 666 Old Country Road, Suite 605 Garden City, New York 11530 SEIDEN WAYNE, LLC Attorneys for Defendants Heron Tower, 70 East 55th Street New York, New York 10022

Upon the following papers numbered 1 to 56 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 25; Answering Affidavits and supporting papers 36 - 40; 41 - 50; Replying Affidavits and supporting papers 51 - 56; Other plaintiff and defendants memorandum of law; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that plaintiff Superior Interior Inc.'s motion for an order granting summary judgment in its favor is determined as follows; and it is further

ORDERED that defendant Pavarini's cross motion for summary judgment dismissing Superior's claims against them is decided as follows.

Defendant International Blind Contractors, Ltd. ("IBC") was hired by defendant Pavarini McGovern, LLC, ("Pavarini") to install motorized window blinds at a building located on West 57th Street in Manhattan. IBC subsequently retained plaintiff Superior Interior Inc. ("Superior") as subcontractors for the project and entered into a written agreement on February 25, 2003, whereby Superior would provide all labor, material and services necessary to complete the installation. The agreement also provided that Superior would be paid $50,000 over the duration of the project upon it's submission of periodic invoices to IBC. Superior commenced work and, despite several stoppages related to alleged nonpayment of its invoices, continued the project until IBC terminated the contract and refused to pay the remaining portion of the sum due under the agreement.

Superior commenced an action against IBC and Pavarini the general contractor on February 6, 2004, and is now seeking summary judgment on its causes of action for an account stated, breach of contract, unjust enrichment and quantum meruit. In support of its motion, Superior submits, inter alia, copies of the pleadings, invoices memorializing periodic payments and agreements between IBC and Superior, and additional work authorization forms signed by Pavarini's representatives. Superior also submits an affidavit by its president, William Boyle, and the transcripts of the deposition testimony of Ricky Janowitz and Taiye Adewumi.

In opposition, IBC argues that Superior's motion should be denied, because there are multiple issues of fact precluding its entitlement to summary judgment. More specifically, IBC asserts that summary judgment on Superior's cause of action for an account stated must be denied, because an issue of fact exists regarding whether the parties agreed on the final amount due for the work Superior performed under the contract. IBC also argues that summary judgment in favor of Superior on its breach of contract and unjust enrichment claims must be denied, because issues of fact exists as to whether Superior completed its performance in a satisfactory manner and whether it was fully paid for the work it performed.

Defendant Pavarini also now moves for summary judgment dismissing Superior's claims against it. Pavarini argues that, as a subcontractor, Superior is precluded from maintaining an action against it for breach of contract, since no privity of contract exists between the parties. Pavarini further asserts that Superior's quasi contract claim for unjust enrichment is not actionable, as it neither shared any privity of contract with Superior nor assumed the obligation to pay for services rendered by Superior during the project. In support of its motion, Pavarini submits the affidavit of its project manager, Taiye Adewumi, wherein he avers that additional work authorizations signed by Kevin Devine, a former Pavarini employee, merely verified the time that Superior's workers were present at the job site.

In opposition, Superior argues that Pavarini's motion should be denied because a material issue of fact exist as to whether work authorizations signed by Pavarini's superintendents constituted a separate direct contract between Superior and Pavarini. Superior also contends that issues of fact exists as to whether Pavarini is directly responsible for the payment of the sums owed to Superior or, alternately, whether the relationship between Pavarini and Superior so closely approached that of privity that Pavarini should be held liable. Superior submits six work authorization forms signed by Pavarini's project superintendents, which directly list Superior as a subcontractor on the project, in opposition to the cross motion.

In its complaint, Superior alleges that it submitted invoices to IBC seeking payment for its performance under the contract, as well as sums it earned in lieu of authorized overtime premium pay and additional work it performed during the project. Superior alleges that it received a total of $26,000 dollars in payment from IBC for work it performed in relation to the base contract. These payments include $8,000 for invoice 301, $8,000 for invoice 303, and $10,000 for invoice number 401. However, Superior contends that IBC failed to pay the sum of $10,000 requested via invoice 306, as well as the sum of $24,000 due under the base contract. With regards to overtime, premium pay and additional invoices not covered in the base contract, Superior's complaint indicates that it submitted invoice number 302, 304 and 305 for $1,899, $1,282 and $1,665 respectively, which were approved and paid

in full. Superior, alleges that it also submitted invoice number 307 for $1,575 related to additional work and overtime, invoice number 309 for $3,000 related to additional blocking , and invoice numbers 310 and 311 for $2,835, which allegedly were authorized by Pavarini's project foreman but never paid. Additionally, Superior asserts that although IBC accepted the rest of its invoices without rejection, it did not make any further payments toward the $24,000 balance due under the base contract, the $3,000 for additional work it performed, or the $9,202 allegedly due for overtime and premium pay.

The agreement between Superior and IBC allegedly was reduced to writing on invoice number 301 which contains the address of the project location and states "twenty-six motorized Mechanical Solar Shades, incline with guide cables." Written beneath the notation is the amount $50,000. The face of the invoice also bears two asterisks with the following statements written beside them: "Not to include overtime" and "Additional blocking." The invoice also refers to invoice number 301 for $8,000, and invoice number 401 for $8,000.

In his affidavit, Superior's president, William Boyle, states that he personally met with IBC's principal, Ricky Janowitz, and entered into a verbal agreement, which was reduced to writing on Superior's invoice numbered 301. Boyle indicated that the contract specifically stated that overtime was not included in the base contract amount of $50,000. Boyle claimed that IBC demanded that Superior perform the work during after hours, because the tenant had already moved into the building. He also indicated that he had a specific conversation with Janowitz regarding overtime and premium time payments, wherein Janowitz advised him that he should keep a record regarding such claims and send him the invoices. Boyle also states that Janowitz instructed him to bill IBC for the premium portion of overtime work. Boyle further claimed that, but for Janowitz assurances that overtime and premium time payments would have been reimbursed by IBC or Pavarini, he would have ordered his workers to cease work on the project. Boyle indicated that of the 26 blinds to be installed under the base contract, Superior installed 21 blinds. He also explained that with the exception of two-to-four shades, made inaccessible because Pavarini failed to complete stone work in the area, the installation of the blinds were 90% complete. Boyle further estimated that if Superior had not been removed from the job site, it would have taken 21 hours in total to complete the entire project.

In his affidavit, Ricky Janowitz avers that it took IBC's workers approximately 400 hours to complete the project and correct defects, which allegedly resulted from Superior's shoddy work. He also states that IBC expended approximately $10,000 in labor costs to complete the project, including the additional cost of labor to install guide cables for the remaining motorized blinds, correct defects, and "adjust and shim" the fabric of shades previously installed by Superior. Janowitz also states that the payments made to Superior in relation to invoice 304 and invoice 305, which sought overtime and premium pay, resulted from a clerical error. Janowitz further explains that he did not indicate that IBC would pay premium time or overtime, because it was his belief that the parties agreed that all the work by Superior would be done at night and that no overtime would have been necessary. Janowitz also avers that his rejection of Superior's claims for overtime were consistent with industry practice.

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently, by tender of evidentiary proof in admissible form, to warrant the court to direct judgment in his favor as a matter of law. To defeat a motion for summary judgment, the opposing party must show

facts sufficient to require a trial of any material issue of fact. Thus, on a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility, but to determine whether triable issues of fact exist (*see, **Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). Mere conclusions or unsubstantiated allegations or assertions are insufficient to raise triable issues of facts (*see*, ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

With regard to Superior's first cause of action for breach of contract, the traditional elements for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage. If a party substantially performed its contractual obligations, it is entitled to the payment due under the contract less a deduction for the cost of completion or correction for any defects in its performance (*see*, ***James E. McMurray Enters., v Frohlich***, 309 AD2d 836, 766 NYS2d 78 [2003]; ***Teramo & Co. v O'Brien-Sheipe Funeral Home***, 283 AD2d 635, 725 NYS2d 87 [2001]; ***A-1 Gen. Contr. v River Mkt. Commodities***, 212 AD2d 897, 622 NYS2d 378 [1995]). However, the question of whether there has been substantial performance, or a breach, is to be determined, whenever there is any doubt, by the trier of fact, or if the inferences are certain, by the judges in law (*see*, ***Jacob & Youngs Inc. v Kent***, 230 NY 239, 129 NE 889 [1921]; ***F. Garofalo Elec. Co. v New York Univ.***, 300 AD2d 186, 754 NYS2d 227 [2002]; ***J. C. Drywall & Acoustical Contrs., v West Shore Partners***, 187 AD2d 564, 590 NYS2d 216 [1992]).

A party has substantially performed under the contract when the breaches are minor in comparison to the performance tendered and the primary purpose of the contract was fulfilled such that the other party received that for which they bargained. The party attempting to prove substantial performance must establish that the defects were insubstantial, minor or trivial and the cost of correcting such defects, or if correction is not reasonable under the circumstances, the reduction that should be made in the value of the contract (*see*, ***Spence v Ham***, 163 NY 220, 57 NE 412 [1900]; ***Carefree Bldg. Prods. v Belina***, 169 AD2d 956, 564 NYS2d 852 [1991]; ***Jerry B. Wilson Roofing & Painting v Jacob-E. R. Kelly Assoc.***, 128 AD2d 953, 513 NYS2d 263, *lv denied* 70 NY2d 828, 523 NYS2d 490 [1987]).

Although Superior avers that it substantially fulfilled it obligations under the base contract, it failed to establish its entitlement to summary judgment by demonstrating that IBC received what it bargained for under the contract, or that the defects were so trivial that the cost of correcting them were insubstantial (*see*, ***Jerry B. Wilson Roofing & Painting v Jacob-E. R. Kelly Assoc.***, *supra*; ***J . C. Drywall & Acoustical Contrs., Inc. v West Shore Partners***, *supra*). While Boyle indicated that, with the exception of a few shades made inaccessible because of ongoing stone work, Superior installed 21 of 26 blinds, Janowitz averred that it took IBC's workers approximately 400 hours to complete the project and correct defects due to Superior's shoddy work. Janowitz also indicated that IBC expended approximately 10,000 dollars in additional labor costs to complete the project; including the additional cost of labor to install guide cables for the remaining motorized blinds, correct defects and "adjust and shim" the fabric of shades previously installed by Superior. Thus, as issues of fact exist as to whether Superior rendered substantial performance of its contractual obligations, its motion for summary judgment against IBC on the claim for breach of the base contract is denied (*see*, ***Carefree Bldg. Prods. v Belina***, *supra*).

With regard to Superior's breach of contract claim seeking payments for premium and over-time pay an examination of invoice 301 reveals that the parties simply wrote "not to include overtime." The invoice does not contain any other note as to whether overtime work was expected, or how overtime or premium time would be calculated. Where, as in this case, an ambiguous term is found in the contract, the court may consider extrinsic evidence to determine the construction placed upon the term by the parties themselves as established by their conduct (*see*, ***Morash v State***, 286 AD2d 510, 703 NYS2d 55, *lv denied* 95 NY2d 755, 712 NYS2d 447 [2000]; ***Seaman Furniture Co. v Seaman***, 267 AD2d 297, 701 NYS2d 82 [1999]). However, where the determination of the parties intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, an issue of fact is presented and the ambiguity must be resolved by a trial (*see*, ***Amusement Bus. Underwriters v Am. Intl. Group***, 66 NY2d 878, 498 NYS2d 760 [1985]; ***Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.***, 165 AD2d 854, 560 NYS2d 317 [1990]). A review of the parties' conduct as gleaned from their respective affidavits reveals that the determination of their intent with regard to the issue of overtime and premium pay is rife with issues of fact and credibility and, therefore, is not susceptible to resolution on a motion for summary judgment (*see*, ***Amusement Bus. Underwriters v Am. Intl. Group***, *supra*; ***Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.***, *supra*; *see also* ***Harza Northeast, Inc. v Leher McGovern Bovis Inc.***, 255 AD2d 935, 680 NYS2d 379 [1988]).

Nevertheless, Superior has established its prima facie entitlement to summary judgment for the portion of its complaint related to IBC's failure to pay for additional blocking it performed during the project (*see*. ***Comm'rs of State Ins. Fund v Branicki***, 2 Misc 3d 972, 775 NYS2d 443 [2004]). The contract evinced that the parties contemplated that additional blocking would be performed during the course of Superior's performance. During his examination before trial, Janowitz testified that Superior performed the additional blocking in a satisfactory manner and that IBC received invoice 309 requesting payment for services rendered. Therefore, general contentions within Janowitz's affidavit that Superior failed to complete its performance or performed in a shoddy manner is insufficient to defeat Superior's breach of contract claim as it relates to IBC's failure to remit payments for invoice 309 (*see, **Roth v Barreto***, *supra*; ***Zuckerman v New York***, *supra*). Therefore, the portion of Superior's motion seeking summary judgment on its first cause of action for breach of contract as against IBC is denied. However, the portion of Superior's breach of contract claim alleging IBC's failure to pay for additional blocking it performed during the project is granted.

With regard to Superior's second cause of action for an account stated, in order to meet its prima facie burden for summary judgment, a plaintiff must demonstrate that there was an agreement, implied or express, regarding the final amount due on an account stated (*see*, ***Yannelli, Zevin & Civardi v Sakol,*** 298 AD2d 579, 749 NYS2d 270 [2002]). Where the party receiving the account stated fails to make an objection within a reasonable time its silence may be construed as an acquiescence to the amount owed, despite the absence of an express agreement (*see*, ***Yannelli, Zevin & Civardi v Sakol,*** *supra*). However, whether a bill has been held without objection for a period of time sufficient to give an inference of assent "is ordinarily a question of fact and becomes a question of law only in those cases where only one inference is rationally possible" (***Legum v Ruthen*** 211 AD2d 701, 703, 621 NYS2d 649 [1995]). Oral objections that indicate that the parties have not reached a meeting of the minds as to the final amount owed is enough to defeat a motion for summary judgment for an account stated (*see*,

Rodkinson v Haecker, 248 NY 480, 162 NE 493 [1928]; ***Prudential Bldg. Maintenance Corp. v Sideman Assoc.,***86 AD2d 519, 445 NYS2d 758[1982]). Moreover, it is well established that "a claim for an account stated may not be utilized simply as another means to collect under a disputed contract" (***Martin H. Bauman Assocs. v H & M Intl. Transp.***, 171 AD2d 479, 485, 567 NYS2d 404 [1991]; *see*, ***Erdman Anthony & Assocs. v Barkstrom***, 298 AD2d 981, 747 NYS2d 670 [2002]).

Although Superior has met its initial burden for summary judgment on its cause of action for an account stated by submitting evidence that IBC received and retained its invoices for over four years following the termination of their contract (*see*, ***Yannelli, Zevin & Civardi v Sakol,*** *supra*), IBC has demonstrated the existence of an issue of fact as to whether the parties reached a meeting of the minds regarding the final sum owed (*see*, ***Rodkinson v Haecker***, *supra*; ***Prudential Bldg. Maintenance Corp. v Burton Sideman Assoc.,*** *supra*). IBC submitted an affidavit from Janowitz, wherein he states that he personally contacted Boyle, and told him that IBC rejected invoice number 306, on the grounds that Superior performed shoddy work and failed to complete the entire installation project. Janowitz also states that IBC rejected several invoices submitted by Superior for premium and overtime work, including invoices numbered 306 through to 311. Therefore, the portion of Superior's motion seeking summary judgment on its second cause of action for an account stated as against IBC is denied.

With regard to Superior's third and fourth causes of action, a plaintiff seeking to recover on a theory of unjust enrichment must allege and prove: (1) that the defendant was enriched; (2) that such enrichment was at the plaintiff's expense, and (3) that in equity and good conscience, the defendant should be required to return the money or property to the plaintiff (***Cruz v McAneney***, 31 AD3d 54, 59, 816 NYS2d 486 [2006]). In addition, to establish a claim in quantum meruit, a claimant must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered (3) and expectation of compensation therefor, and (4) the reasonable value of the services (***Atlas Refrigeration-Air Conditioning v Lo Pinto***, 33 AD3d 639, 640, 821 NYS2d 900 [2006]). Although they may be pleaded alternatively, causes of action for quantum meruit and for unjust enrichment are grounded in quasi contract. "[W]here a valid and enforceable contract exists governing a particular subject matter, it 'precludes recovery in quasi contract for events arising out of the same subject matter'" (***Mariacher Contr. Co. v Kirst Constr.***,187 AD2d 986, 987, 590 NYS2d 613 [1992], *quoting* ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 388, 521 NYS2d 653 [1987]). Thus, inasmuch as Superior seeks to recover damages under the theories of quantum meruit and unjust enrichment for events arising out of the same subject matter as allegedly contained in its contract with IBC, Superior cannot recover under its third and fourth causes of action (*see*, ***Melissakis v Proto Constr. & Dev. Corp.***, 294 AD2d 342, 741 NYS2d 731 [2002]; *see also*, ***Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.***, *supra*). Therefore, the portion of Superior motion seeking summary judgment on its third and fourth causes of action for recovery in quantum meruit and unjust enrichment as against IBC are denied.

With respect to Superior's claim for premium and overtime time pay, although Pavarini's project manager contends that work authorizations signed by Kevin Devine were for time verification only, Superior submitted additional authorizations signed by Joe Pollice, which do not contain the acronym "TVO." Moreover, even where "TVO" was written, each authorization also conspicuously bore the language "Subcontractor is hereby authorized to perform the following work at additional charge as

follows ." Pavarini does not deny that Kevin Devine nor Joe Pollice were its general superintendents during the project, and offers nothing to substantiate its project manager's assertion that Kevin Devine did not have the apparent or actual authority to authorize premium time payment to Superior. Pavarini also failed to address the work authorizations signed by Joe Pollice. Thus, issues of fact and credibility exist as to whether Pavarini assumed the obligation to pay Superior for the work authorized by its project superintendents. Accordingly, the portion of Pavarini's cross motion seeking to dismiss this claim is denied (*see, **Roth v Barreto**, supra*; ***Zuckerman v New York***, *supra*).

As to the portions of Pavarini's motion for dismissal of Superior's claims against it for breach of contract and unjust enrichment, it is undisputed that Pavarini never entered into a contract with Superior for the installation of the blinds. Pavarini also established prima facie that there was no privity of contract between itself and Superior, and that it did not assume an obligation to pay Superior for work performed at the behest of IBC under the base contract (*see*, ***Outrigger Constr. Co. v Bank Leumi Trust Co.***, 240 AD2d 382, 658 NYS2d 394 [1997]; ***Amana Elevation Corp v Ydrohoos- Aquarius, Inc.***, 244 AD2d 371 , 664 NYS2d 88 [1997]; ***Kagan v K-Tel Entertainment, Inc.***, 172 AD2d 375, 568 NYS2d 756 [1991]; ***Elec. Mfg Co. v Herbert Constr. Co.***, 183 AD2d 758, 583 NYS2d 497 [1992]). Superior's mere assertion that Pavarini consented to its performance and thereby was conferred a benefit is also insufficient to raise an issue of fact as to Pavarini's liability under the theories of unjust enrichment and quasi contract (*see*, ***Outrigger Constr. Co. v Bank Leumi Trust Co.,*** *supra*; ***Elec. Mfg Co. v Herbert Constr. Co.***, *supra*; *see also* ***Port Charles Elec. Constr. Corp. V Atlas***, 40 NY2d 652, 389 NYS2d 327 [1976]). Therefore, the cross motion seeking summary judgment dismissing Superior's claims against Pavarini for breach of contract, unjust enrichment and quantum meruit is granted.

Dated: JAN 3 0 2008

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION