

Bryant Installations, Inc. v Feliz

2008 NY Slip Op 31633(U)

June 2, 2008

Supreme Court, Nassau County

Docket Number: 9176-05/

Judge: Thomas P. Phelan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 5
NASSAU COUNTY

BRYANT INSTALLATIONS, INC.,

Plaintiff(s),

-against-

FRANKLIN FELIZ AND JENNY FELIZ,

Defendant(s).

ORIGINAL RETURN DATE:01/22/08
SUBMISSION DATE: 04/17/08
INDEX No.: 019176/05

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1,2
Answering Papers.....	3,4

Motion by plaintiff Bryant Installations, Inc. ("Bryant") pursuant to CPLR 3212 for an order dismissing the counterclaim of defendants Franklin Feliz and Jenny Feliz ("Feliz") is denied. Motion by defendants Feliz which states that it seeks an order granting "plaintiff" summary judgment dismissing "defendants' counterclaims" is deemed one for summary judgment on defendants' counterclaim dismissing plaintiff's complaint, and this motion is also denied.

In order to obtain summary judgment a movant "must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law (citations omitted). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests" and "'unsubstantiated allegations or assertions are insufficient' for this purpose" (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). The evidence offered by plaintiff is the agreement with the Feliz defendants, depositions, an unsworn independent engineer's report, and various documents and correspondence. The evidence does not present a prima facie case entitling plaintiff to dismissal of the counterclaim. On the motions before the court there is a dearth of admissible evidence and multiple questions of fact.

In this action to foreclose upon a mechanic's lien, the counterclaim which the plaintiff contractor seeks to dismiss alleges that on or about March 28, 2004, defendants Feliz entered into a contract with plaintiff Bryant to construct, improve and supply materials and services for a single-family

RE: BRYANT INSTALLATIONS v. FELIZ

Page 2.

residence located at 22 Gold Place in the Incorporated Village of Malverne, County of Nassau (the "Agreement"). The counterclaim alleges that in connection with the Agreement defendants paid Bryant the sum of \$95,000, and on August 1, 2004, Bryant materially breached the Agreement by walking off the job without just cause and refused to complete the assigned work.

The counterclaim further alleges that on August 12, 2004, Joseph Maietta, Building Inspector for the Incorporated Village of Malverne, made a site visit to 22 Gold Place to ascertain the condition of the site and structure and found it to be in "terrible and dangerous condition." On August 13, 2004, the Incorporated Village of Malverne (the "Village") served a Stop Work Order on the property. The Village engineering firm of Sidney Bowne & Son ("Bowne") inspected the premises and reviewed the applications and plans at the request of the Village. Bowne's report detailed substantial defects in workmanship. On November 8, 2004, Bryant was notified that as a result of its abandonment of the worksite and poor quality workmanship, the Village was opposed to Bryant completing the work, and the Stop Work Order remained in effect. On January 21, 2005, the Village required the structure to be demolished because of severe safety concerns and the inability of the structure to sustain wind and/or snow loads in its then present condition.

Defendants allege that they had no choice but to go forward with another contractor and hold Bryant "responsible in connection with the material breach of contract and correction of improper work."

Plaintiff seeks dismissal of this counterclaim on the grounds that there is no evidence that Bryant was the "proximate cause" of defendants' alleged damages. Defendants, on the other hand, seek summary judgment on the counterclaim. Conflicting evidence and fact issues preclude an award of judgment to either party on their claims.

Both parties appear to have operated outside the parameters of the written agreement, and thus factual issues regarding breach and waiver are presented and intertwined. For example, Bryant demanded payment of \$25,000 before proceeding with the framing on the construction, while at the same time it agreed to operate under a certain construction loan which did not provide for an additional payout until the framing was completed. A question of breach arises; however, in defense Bryant avers that Nicholas Varlotta, the architect chosen by the Feliz defendants, altered the plans for the framing and generated additional costs, and that the Feliz defendants were obligated to pay extra costs under the Agreement. In turn, the Feliz defendants aver that any modifications of the construction plans required a change order signed by the owners, contractor and approved by the lender. Bryant has not produced same. Defendants also aver that Bryant produced an unworkmanlike product as reflected by the Town's engineers and inspectors and is not entitled to further payment. Such issues cannot be resolved on this summary judgment motion, particularly since none of the expert evidence is sworn.

Moreover, the parties continued to negotiate over the project until November 2004, months after Bryant abandoned the worksite and after a Stop Work Order issued in August of the same year. The continued negotiations rendered the abandonment non final, while the Stop Work

Order prevented a return to the work site. The demonstrated intention to resolve payment issues by the continued negotiation precludes any matter of law determination by this court regarding liability.

With respect to the counterclaim and proximate cause, although there was a stop work order issued by the Village preventing Bryant from completing the work, it has not been established that Bryant was willing to remedy the noted defects in order to lift the Stop Work Order, or was prevented from lifting same, or was unable to adequately protect the worksite before the stop order issued, or to obtain permission to do so afterward. The parties continued negotiations after September 2004 when an independent engineer suggested that work resume immediately in order to avoid damage during the winter season. Notwithstanding Bryant's contention that Nicholas Varlotta, the Village or the subsequent contractor retained by the defendants proximately caused defendants' claimed damages, a finding as a matter of law with regard to Bryant's fault in failing to resume or protect the unfinished premises from the elements cannot be made, and it cannot be said as a matter of law that Bryant's conduct was not a substantial factor in causing the damage. Bryant has not established any conduct which can be deemed an "extraordinary intervening event" relieving it of liability (see, *Jorgensen v. Century 21 Real Estate Corp.*, 217 AD2d 533, 534 [2d Dept 1995]). Rather the issues raised appear to concern a failure to mitigate damages. A letter from Bryant dated September 28, 2004, states that Bryant "must receive payment before we can resume our work." Whether this demand was in accord with the Agreement between the parties, the construction loan or the requirements of the architect remains a factual issue. Indeed, plaintiff has not submitted any admissible evidence to support its claim that the changes to the architectural plans caused additional expense. No invoice from the subcontractor or statement by the architect regarding additional cost is submitted. It is merely plaintiff's unsupported claim that the changes required additional funding. In any event, the noted issues are inherently factual and cannot be determined on a summary judgment motion. Based upon all of the foregoing, the two motions are denied.

This decision constitutes the order of the court.

Dated: 6-2-08

HON THOMAS P. PHELAN

[Signature]
J.S.C.

Lazer, Aptheker, Rosella & Yedid, P.C.
Attn: Giuseppe Franzella, Esq.
Attorneys for Plaintiff
225 Old Country Road
Melville, NY 11747

Noreen A. Donovan, PC
Attorney for Defendants
245 Hillside Avenue
Williston Park, NY 11596

ENTERED
JUN 06 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE