

**United Steelworkers of Am. v Rockwood
Constr. Co.**

2008 NY Slip Op 32895(U)

October 21, 2008

Supreme Court, Steuben County

Docket Number: 91338

Judge: Marianne Furfure

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**State of New York
Supreme Court : County of Steuben**

**UNITED STEELWORKERS OF AMERICA,
DISTRICT NO. 4 - AFL-CIO LOCAL UNION
1013T (f/k/a American Flint Glass Workers
Union AFL-CIO Local Union No. 1013)**

Plaintiff,

**DECISION
Index # 91338**

- against -

**ROCKWOOD CONSTRUCTION CO., and
ROCKWOOD OVERHEAD DOORS,
DIVISIONS OF C.W. FINK and ASSOCIATES,
INC., and C.W. FINK and ASSOCIATES, INC.**

Defendants.

Appearances: *Buck, Danaher, Ryan and McGlenn, Elmira, (John J. Ryan, Jr. of counsel),*
for plaintiff

Law Office of Robert A. Groff, Jr., Horseheads, for defendants

Plaintiff brought this action to recover money paid to defendants for the construction of a new union hall. Defendants counterclaimed for damages allegedly suffered as a result of plaintiff's cancellation of the construction contract. A non-jury trial was held before the undersigned and six (6) witnesses gave testimony regarding the events which led to the formation of the contract and its ultimate cancellation. The parties were given the opportunity to submit case law for the court's consideration and decision was reserved. Based upon the testimony, exhibits received into evidence and the applicable law, I make the following findings of fact and conclusions of law:

During the spring of 2003, in accordance with a vote of the union membership, plaintiff's then President, William Drake, IV, sought bids for the construction of a new union hall to be constructed in the Town of Bath on land already owned by plaintiff. After the

bidding process was complete, the Union selected the bid submitted by Charles Fink, the representative and principal stockholder of Rockwood Construction Company. Thereafter, Drake met with Fink at the site, discussed placement of the building and defendants' plan to use a manufactured all steel building on the site. Fink prepared a "Proposal and Payment Schedule" which set forth the work to be performed, the total cost of \$152,464.00 and a periodic payment schedule. This document did not state a time for completion of the building, not any contingencies for financing by the Union.

Although Fink submitted the contract to Drake on or about August 21, 2003, the Union did not sign the agreement until October 14, 2003. On that date, the Union also signed a mortgage commitment with Bath National Bank to secure a commercial mortgage on the property for \$70,848.66. Under this commitment, Bath National Bank required evidence that the Union had expended \$81,615.00 on the project and that foundation work had been started, before it would disperse any sums. The commitment was to expire on December 6, 2003, unless extended by the Bank. The Union Vice President wrote a check from the Union's funds to defendants for \$46,721.34 on October 15, 2003. This represented the first periodic payment under the agreement "to order building and materials/schedule project" (Exhibit 4). Although Drake had expected that construction would begin as soon as the building was ordered, Fink discussed delaying the start date until the spring of 2004. Fink explained to Drake that, when the proposal was initially submitted in August, he did not anticipate the Union would wait two months to sign it and he had not factored in the additional costs for winter construction. Fink offered to purchase the building and store it through the winter months to avoid any price increase that might occur. Drake went to the Union's executive board and they agreed to postpone the start date of the project. No further discussion was had between the Union and Fink until sometime in late February or early March, 2004. In the interim, plaintiff obtained an extension of the commitment from the Bank, first to February 6, 2004, and then to April 6, 2004.

In January of 2004, the leadership of the Union changed, William Drake was replaced as president by Vivian Geyer. Drake testified that he advised Geyer the building was being stored and that construction was to begin in March, weather permitting. Beginning in late February or early March, Geyer requested the Vice President, Gary Hargrave, to set up a meeting with Mr. Fink regarding the project. Fink did contact the Union and requested to speak with Mr. Drake. He was informed that Drake was no longer president and all contact had to be with Ms. Geyer. This was reiterated in a letter sent to Fink on or about April 14, 2004. In that letter, Geyer advised Fink "we cannot have you start the project until we have a meeting with you" (Exhibit 10). Geyer testified that at that time, the Union had every intention to go forward with the project. However, five (5) days later, the Union's attorney wrote to Mr. Fink on April 19, 2004, notifying him that the Union no longer had financing for the project and "under all circumstances, I believe that it is better to simply cancel the contract and return the money" (Exhibit 11).

Fink acknowledged that when he was initially contacted by the Union in the Spring of 2004, he was at work on a construction project in Cortland which he did not complete until April 30, 2004. He also acknowledged that, although a meeting had been scheduled in May with the Union representatives, he cancelled that meeting to attend to some family matters and did not meet with them until June, 2004.

At the June meeting, Fink acknowledged he did not have the building in storage and had not yet ordered it because the price of the building had not changed since last year. He agreed that he would still complete the project for the original price. Both parties indicated a desire to proceed forward with the project. They set a date for Fink to provide color choices and a floor plan layout to the Union and start dates for commencement of site work and delivery of the building. The terms of the understanding were memorialized in a letter from plaintiff's counsel on June 14, 2004. At the conclusion of the letter, it reiterated that the Union did not have financing, but they were pursuing alternate sources (Exhibit 13). The letter did not purport to cancel the contract based on defendant's delay in commencing the

project, rather it stated the Union would keep Fink advised of their progress on finding alternate funding. It also confirmed defendant was ready and able to commence the project. On July 7, 2004, the Union's lawyer again wrote to Fink advising him that the Union may not be able to proceed (Exhibit 14). After a Union vote not to proceed with the building project in August of 2004, the Union notified Fink that they were cancelling the contract and wanted their money back. Although Fink testified that he had ordered the building several times from October 2003 to June 2004, no order was actually placed with the manufacturer, no site work was ever performed and none of plaintiff's initial payment was expended on the project.

Fink testified that, as a result of the loss of this project, he had reduced earnings for 2004 and did not bid on three (3) other projects from April to October, 2004. He testified that he estimated this project would last approximately three (3) months and anticipated a profit of 20% of the total contract price. On cross examination, Fink acknowledged he had previously testified that he generally hoped for a profit of 15 to 18% on his projects but that he didn't always get it. He also testified that he was able to begin the project anytime after April and was ready to do so, as soon as plaintiff authorized him to go forward.

Plaintiff alleges that defendants breached the parties' agreement by failing to order the building and commence the project prior to April 6, 2004, when plaintiff's financing expired. As a result of defendants' breach, plaintiff seeks return of its initial payment of \$46,721.34. Defendants assert that plaintiff forfeited the initial payment once it rescinded the contract. In the alternative, defendants assert that plaintiff wrongfully terminated the contract, despite defendants' willingness to perform and that, as a result, defendant was damaged in the sum of \$50,000.00.

Plaintiff bears the initial burden of proof that defendants materially breached the construction contract by failing to order the building and commence construction in a timely manner. The contract which the parties entered into did not set a time for commencement or completion of the project. Neither did it contain any contingencies for bank financing.

Additionally, there was no proof that defendant was ever notified in advance that construction had to be commenced by a certain date in order for plaintiff to continue with the project.

“Where there is no express provision in a contract relating to time of performance, a reasonable time is implied” (*Lake Steel Erection, Inc. vs. Egan*, 61 AD3d 1125, 1126 [4th Dept. 1978]). In determining whether performance was unreasonably delayed, the Court “may consider the subject matter of the contract, the situation of the parties, their intention, what they contemplated at the time the contract was made and the circumstances attending performance” (id at 1126).

In this case, the parties agreed to delay any construction until the Spring of 2004. No specific date was set for commencement. Once the change in Union leadership occurred, plaintiff took no steps to establish a deadline for construction until late February or early March. Defendant was not ready to begin the project until late April, so he did not promptly respond to plaintiff’s inquiries. Plaintiff never communicated to defendant that they needed him to begin the project or produce an invoice for the building until after the bank financing had already expired in April. Rather than send defendant a letter demanding immediate performance, plaintiff’s president first advised defendant on April 14, 2004, not to proceed until further contact from the Union. When the parties met in June, plaintiff still wished to proceed with the building but told defendant to hold off until the plaintiff firmed up its financing. Based on all the circumstances surrounding the dealings of the parties, it cannot be said that defendants’ failure to order the building and commence construction was unreasonable and a material breach of the contract. Plaintiff’s president testified that the Union still intended to proceed with the project, until the vote in August, despite letters from plaintiff’s attorney seeking to cancel the project due to the absence of bank financing. Although defendant was not ready to begin the project until the end of May, he had never been informed that time was of the essence or that any financing was in jeopardy. He was asked to not begin work in April and thereafter, due to the Union’s financing. The contract

contained no contingency for bank financing. Therefore, plaintiff has failed to prove that defendants materially breached the contract.

Defendants' counterclaim for breach of contract has been sustained. Defendants proved that they were willing to perform the contract at the price originally agreed upon and stood willing to perform on the schedule set by the parties at the June 7, 2004, meeting. He remained prepared and able to proceed until the contract was cancelled by plaintiff in August after financing could not be secured and the membership chose not to commit any further funds for the project. This repudiation of the contract by the Union constituted a breach entitling defendants to damages (*Ryan v. Corbett*, 30 AD3d 1062 [4th Dept. 2006]).

When a construction contract has been breached by an owner, the contractor is entitled to recover expectancy damages, that is either the anticipated profit from the contract or the contract price less the cost of performance (*JR Loftus, Inc. v. White*, 85 NY2d 874, 877 [1995]). Although defendants have sought to retain the entire amount paid by plaintiff or the sum of \$50,000.00, both exceed the amount of defendant's anticipated profit from the project. Defendant acknowledged that he usually anticipated a profit of 15 to 18 % on projects, therefore, his recovery here must be so limited. Defendants did not allege or prove that they had incurred any costs in performing under the contract.

Based upon the contract price of \$152,464.00 and a profit of 15 %. defendants' damages are established at \$22,869.60. Therefore, plaintiff is entitled to a refund of any sums paid over and above this amount.

Defendant to submit judgment.

ENTER:

DATED: *October 21, 2008*


Marianne Furfure
Acting Supreme Court Justice