

O'Grady Constr. Corp. v Lax

2008 NY Slip Op 33197(U)

November 25, 2008

Supreme Court, New York County

Docket Number: 107797/07

Judge: Michael D. Stallman

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

PRESENT: STABUMAR
Justice

PART 2

O'GRADY CONSTRUCTION CORP
- v -
BARRY LAX

INDEX NO. 107797/07
MOTION DATE 2/7/08
MOTION SEQ. NO. 001
MOTION CAL. NO. 5

The following papers, numbered 1 to 6 were read on this motion to/for dismiss & discharge liens

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

Answering Affidavits -- Exhibits A-0

Replying Affidavits _____

PAPERS NUMBERED

1-4

5

6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion **"Is determined in accordance with the annexed memorandum decision and order."**

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

FILED
DEC 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/5/08

1

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 7

-----X
O'GRADY CONSTRUCTION CORP.,

Plaintiff,

-against-

Index No. 107797/07

BARRY LAX, KRISTIN LAX, 610 WEST END CORP.,
and TUDOR REALTY SERVICES,

DECISION AND ORDER

Defendants.

FILED

DEC 01 2008

COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. MICHAEL D. STALLMAN, J.:

Defendants Barry and Kristin Lax move, by ~~their~~ new cause, to dismiss the complaint and to discharge all mechanics liens filed on their property. The parties have stipulated that the liens are to be discharged upon the filing of an undertaking.

Plaintiff, O'Grady Construction Corp.(O'Grady Corp), brings this action to recover \$72,000.00 for labor and materials provided to defendants Barry and Kristin Lax in connection with the renovation of their co-operative apartment at 610 West End Avenue, Apartment 1C, New York, New York.

Patrick O'Grady (O'Grady), an owner of O'Grady Corp., alleges that he first met Barry Lax in July 2006, to discuss the gut renovation of his apartment at the above address. Thereafter, on July 20, 2006, O'Grady faxed a two-page document to the Laxes with a breakdown of the scope of the work and an estimate of \$322,300.00 for the project. Later, the parties agreed that the demolition of the apartment would be a separate contract for the sum of \$20,000.00. The demolition was completed by O'Grady Corp, and the Laxes paid the agreed upon sum of \$20,000.00 by checks dated July 26, 2006 and August 18, 2006.

Shortly thereafter, the parties entered into a written agreement, dated September 4, 2006, for the renovation of the apartment for the base amount of \$290,000.00 (the Contract). Article 3 of the Contract, entitled "The Contract Price," provides that: "[t]he owner shall pay the Contractor for the material and labor to be performed under the Contract the sum of two hundred and ninty (sic) thousand Dollars (\$290,000.00), subject to additions and deductions pursuant to authorized change orders" (Catanzaro Aff, Ex. C). Article 2 of the Contract, entitled "Time of Completion" provided that: "[t]he work performed under this Contract shall be commenced on or before Sept 6th, 2006, and shall be completed on or before Nov. 1, 2006. Time is of the essence. The following constitutes substantial completion of work pursuant to this proposal and contract: (Specify) renovation of apt 1C as specified by drawings by Korth Sunseri, Hagey (Jeana Malick)" (*id.*). Article 5 of the Contract, entitled "General Provisions" provided that any alteration or deviation involving additional material and/or labor costs would be executed upon a written order, signed by the owner and contractor, and charges for such change-orders would be added to the Contract price.

According to O'Grady, the Laxes desired a "design-build" project, meaning that, at the request of the Laxes, the design would change as the project progressed, and accordingly the monetary price of the contract would change.

On September 6, 2006, the Laxes made an initial payment to O'Grady in the amount of \$58,000.00. O'Grady states that on September 15, 2006, the wall layout was complete and all temporary electrical lines were installed. O'Grady further states that, on that same day, he met with the architect and Barry and Kristin Lax regarding a number of changes to be made to the foyer area. Since this was a design-build, these changes were not part of the base contract.

Thereafter, on September 18, 2006, the Laxes made additional changes to the foyer entrance.

On September 19th, the foyer layout was changed for a third time on the request of Kristin Lax.

O'Grady alleges that throughout October, the Laxes made daily changes to the plans. On October 11th, Barry Lax issued the second installment payment of the base contract by issuing a check in the amount of \$68,000.00 to O'Grady. On October 27, 2006, the change-orders were submitted to the architect for the Laxes to sign-off.

On October 30, 2006, the relationship between the parties changed when SNO Maintenance (SNO), the electrical sub-contractor, refused to return to work until it was paid. SNO apparently informed the Laxes that O'Grady's check had bounced. According to O'Grady, the Laxes thereafter expressed, for the first time, their concern regarding the time schedule of the project and the payment of the subcontractors.

On November 1, 2006, the parties held an emergency meeting to discuss those items that needed to be ordered for the project, as well as the change-orders, which had not yet been signed. O'Grady alleges that he informed the Laxes that, due to the constant changes in plans, the original completion date of November 1st would have to be pushed back to November 15th. By way of example, O'Grady notes that he did not get the new plans for the master bathroom until October 26th.

O'Grady contends that, as of November 2nd, the Laxes were still undecided about the finishes and details on their apartment. O'Grady brought this to the attention of Barry Lax, as well as the non-payment of the change-orders, and states that he received a verbal guarantee from Lax that he would receive payment on all of the change-orders. Thereafter, Lax requested that he be given information on payments made to the subcontractors and further requested that he pay the subcontractors directly. O'Grady agreed to this arrangement.

O'Grady states that at this time the work was being completed but the Laxes still could not

make up their minds regarding the final touches to the project, specifically the millwork. On November 7, 2006, O'Grady requested that Lax pay the subcontractors and himself on the change-orders. Barry Lax then requested again that O'Grady inform him as to all payments made to subcontractors.

O'Grady alleges that the Laxes did not make additional payments to him, but that he continued to do work, based on his guarantee from Barry Lax that he would receive payment on all of the outstanding change-orders. On November 13th, O'Grady went to the job site and was told by Barry Lax that he was terminated from the project.

On February 16, 2007, O'Grady Corp filed a Notice of Mechanic's Lien in the County Clerk's office, in the amount of \$72,000.00.

In its complaint, O'Grady Corp alleges causes of action for: foreclosure of the mechanics' lien (first cause of action), work, labor and services (second cause of action), breach of contract (third cause of action), unjust enrichment and quantum meruit (fourth cause of action), fraud (fifth cause of action), attorney's fees (set forth as seventh cause of action), interest (set forth as eighth cause of action), and lost profits (set forth as ninth cause of action). There is no sixth cause of action.

The Laxes move to dismiss the complaint on the grounds that the documentary evidence, consisting of their cancelled checks and credit card statements, proves that, including the amounts paid to **O'Grady Corp**, they have paid a total of \$350,000 to complete their renovation. Since, according to the Laxes, the Contract provided for a "ceiling" of \$290,000.00, any claim by O'Grady is conclusively refuted. The Laxes further argue that they still owe an additional \$40,000 to the architect that replaced O'Grady as the construction manager after his termination, and that O'Grady

Corp is therefore not entitled to any further payment.

On a motion to dismiss pursuant to CPLR 3211, the plaintiff is afforded every possible favorable inference and the court's task is to determine only whether the facts, as alleged, fit within any cognizable legal theory (*Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243 [1st Dept 2000]). Under CPLR 3211 (a) (1), a motion to dismiss based upon documentary evidence, the defendant has the burden of demonstrating that the documentary evidence “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim” (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] quoting *Scadura v Robillard*, 256 AD2d 567, 567 [2nd Dept 1998]).

The Laxes have not met that burden. As an initial matter, as noted above, the Contract does not provide for a “ceiling” of \$290,000.00, but rather was “subject to additions and deductions pursuant to authorized change orders” (Catanzaro Aff, Ex. C). The Laxes have not denied that there were substantial changes made as the work progressed. Rather, they argue that since only a few of the change orders were actually signed, the additional costs of the changes may not be added to the Contract price. However, “a party to a written agreement may orally waive enforcement of one of its terms despite a provision to the contrary” (*Taylor v Blaylock & Partners*, 240 AD2d 289, 290 [1st Dept 1997]). Particularly where, as here, it is alleged that a homeowner has requested additional work, which was performed by the contractor, the failure to obtain a signed change-order will not defeat the plaintiff-contractor's claim (see *CGM Constr. v Miller*, 263 AD2d 831 [3d Dept 1999]).

Finally, although the Laxes have set forth their expenditures via cancelled checks and charge statements, it is impossible to determine whether many of the items paid for were within the original scope of the Contract, or whether they were added on. Certain items that the Laxes claim as Contract

expenses were specifically excluded by the Contract. The Estimate supplied by O'Grady to the Laxes, provides under "exclusions and clarifications" that the master bathroom mirror was to be supplied by others, but this item is included in the Laxes list of items purchased to complete the project. Other expenditures claimed by the Laxes are not conclusively attributable to the Contract. By way of example, the cost for the kitchen cabinets was not included in the Contract (Gold Aff., fn. 5). Yet, \$15,000.00 worth of checks presented by the Laxes are made out to, or cashed by, Euro Custom Cabinet Corp. The Laxes also claim that they spent \$4,765.64 on a master bath shower door and \$3,000 at Gracious Home on "hardware and construction supplies." The reasonableness of these expenditures in completion of the Contract is an issue to be explored during discovery and cannot be determined on this motion.

For these reasons, it is

ORDERED that the motion by defendants Barry R. Lax and Kristin Lax to dismiss the complaint is denied.

The parties are directed to appear for a preliminary conference on January 16, 2009 at 9:30 am in IAS Part 7, 111 Centre Street Room 949, New York, New York.

This constitutes the decision and order of the court. Copies to counsel.

Dated: November 23, 2008
New York, New York

ENTER:



J.S.C.

FILED
DEC 01 2008
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