

**Racanelli Dev. Group, LLC v Empire  
Devs. Corp.**

2008 NY Slip Op 33274(U)

December 2, 2008

Supreme Court, Nassau County

Docket Number: 007977/07

Judge: Stephen A. Bucaria

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[\* 1 ]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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RACANELLI DEVELOPMENT GROUP, LLC,

Plaintiff,

-against-

EMPIRE DEVELOPERS CORP., COASTAL BUILDERS CORP., 334 EAST 92<sup>ND</sup> HOUSING DEVELOPMENT FUND CORP., EAST 92<sup>ND</sup> STREET SENIOR HOUSING, L.P., COMMERCE BANK CORP. a/k/a COMMERCE BANK, N.A., THE NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, THE NEW YORK CITY DEPARTMENT OF FINANCE, THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THE UNITED STATES OF AMERICA (INTERNAL REVENUE SERVICE), JOHN DOE and MARY DOE, The last two defendants being individuals or entities presently unknown to the plaintiff or other interests in the premises sought to be foreclosed,

Defendants.

TRIAL/IAS, PART 4  
NASSAU COUNTY

INDEX No. 007977/07

MOTION DATE: Oct. 31, 2008  
Motion Sequence # 001

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The following papers read on this motion:

Notice of Motion.....	X
Affirmation in Opposition.....	X
Reply Affirmation .....	X
Memorandum of Law.....	X

This motion, by plaintiff, for partial judgment pursuant to CPLR 4401 is **denied**.

This is an action for breach of a construction contract. On November 17, 2005, plaintiff Racanelli Development Group entered into a contract with defendant Empire Developers Corp. for the construction of a 6-story residential building to be located at 334-96 East 92<sup>nd</sup> Street in Manhattan. The contract price was \$3,500,000, payable in monthly progress payments in amounts certified as due by the architect. Prior to the first application for payment, the contractor was to submit to the architect a "schedule of values" allocated to various portions of the work. The schedule, unless objected to by the architect, was to be used by the architect as a basis for reviewing the contractor's applications for payment. It appears that the purpose of the schedule of values was to apportion the contract price among the various items of work. For each item of work, the architect was to review the contractor's estimate as to the value of the work performed.

The contract provided in paragraph 14.4 that the owner may, at any time, terminate the contract for "the owner's convenience" and without cause. The contract further provided that in case of termination for the owner's convenience, the contractor shall be entitled to receive "payment for work executed, and costs incurred by reason of such termination." If the contract was terminated for the owner's convenience, the contractor was also entitled to "reasonable termination expenses."

On February 2, 2006, pursuant to an "amendment agreement" among Racanelli, Empire, and defendant Coastal Builders Corp., Empire assigned all of its rights in the contract to Coastal. Coastal assumed all of Empire's obligations under the contract, and Racanelli agreed to "look to Coastal" with respect to any claims which it had under the agreement.

On April 3, 2006, the architect issued certificate for payment no. 3, showing a total amount earned on the contract of \$433,014.57, including extras and net of retainages as provided in the contract. The certificate was issued on an "application and certificate for payment" form drawn by the American Institute of Architects and filled in by the contractor. The application is supported by a "continuation sheet," which lists various

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items of work and a corresponding "scheduled value" and "work completed" figure for each item. After deducting the previous certificates for payment, the certificate showed a current payment due of \$151,386.30.

On April 13, 2006, Sol Arker, the President of Empire, purported to terminate the contract for owner's convenience effective April 20, 2006. There is no dispute that Arker was authorized to take this action on behalf of Coastal.

This action was commenced by Racanelli in Supreme Court, New York County on November 15, 2006. Plaintiff seeks to recover the sum of \$385,523.07 as the balance due on the contract. Plaintiff also seeks to foreclose a mechanic's lien which it filed against the property. By order dated March 15, 2007, venue was transferred to Nassau County. The case was certified as ready for trial on February 22, 2008. Plaintiff filed a note of issue on February 29, 2008. The certification order provides that motions for summary judgment must be filed within 30 days of the date that the note of issue is filed.

Neither party moved for summary judgment within the time frame established by the court. However, on October 13, 2008, plaintiff moved for partial judgment on the basis of admissions pursuant to CPLR 4401. Plaintiff requests partial judgment in the amount of \$145,455.36, allegedly representing the amount due for various items of work after payments to plaintiff and subcontractors. Plaintiff calculates the amount due by adopting the "scheduled values" for various items of work, impliedly asserting that the items were fully performed. For two items which were concededly not completed, backfill and sheeting/shoring, plaintiff utilizes work completed figures which are not disputed by defendants. The court notes that plaintiff is claiming \$60,000 as the scheduled value for the foundation walls and \$40,000 as the scheduled value for footings. However, the continuation sheet shows a work completed value for the footings of only \$14,800 and a work completed value for the foundation walls of 0.00. With respect to extras, plaintiff is claiming \$18,062.35 for change order # 3, retaining walls, but the value of work completed is 0.00. Defendants Empire and Coastal oppose the motion on the ground that it is untimely and plaintiff's notice to admit was improperly addressed to disputed matters.

CPLR 4401 is entitled, "Motion for judgment during trial." It provides that a party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law. Such a motion may be made after the close of evidence presented by an opposing party or "at any time" on the basis of

admissions. However, because CPLR 4401 provides for a motion for judgment during trial, it is clear that the motion may not be made before trial has commenced (Practice Commentary C4401:2). Thus, a party cannot circumvent the time limits for making a motion for summary judgment by characterizing the motion as made pursuant to CPLR 4401. Nevertheless, the court will deem plaintiff's motion as one for summary judgment and determine whether it is timely.

CPLR 3212(a) provides that the court may set a date after which a summary judgment motion may not be made, provided the date is no earlier than 30 days after the filing of the note of issue. If no date is set by the court, the motion shall be made no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown. The court has discretion to grant relief from a summary judgment deadline imposed by the court (*Kunz v. Gleeson*, 9 AD3d 480, 2<sup>nd</sup> Dept., 2004). However, where the motion is made more than 120 days after the filing of the note of issue, good cause must be shown. Plaintiff's motion for summary judgment is predicated upon documents which have been in plaintiff's possession since the onset of litigation. Therefore, plaintiff has not made a showing of good cause for making an untimely motion. Moreover, even were the court to reach the merits, plaintiff's motion for partial judgment must be denied.

CPLR § 3123 provides that not later than 20 days before trial, a party may serve a written request for admission of the genuineness of any papers or documents, the correctness or fairness of any photographs, or the truth of "matters of fact" set forth in the request. The matters of fact must be matters as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of the other party or can be ascertained by him upon reasonable inquiry. The purpose of CPLR § 3123 is to establish "clear-cut matters of fact," not the ultimate issues to be decided in the lawsuit (*Orellana v. New York*, 203 AD2d 542, 2<sup>nd</sup> Dept., 1994). Facts established pursuant to a proper notice to admit may provide the basis for awarding summary judgment (See *Kowalski v. Knox*, 293 AD2d 892, 3<sup>rd</sup> Dept., 2002).

Plaintiff's request, that defendants admit the authenticity of various documents, including the change orders, was proper. However, plaintiff's request that defendants admit that various items of work were completed prior to termination of the contract was improper. Plaintiff could not have reasonably believed that there could be no substantial dispute as to these matters. Having been served with a notice to admit seeking admissions as to contested matters, the proper practice was for defendants to serve a sworn statement, denying the contested matters or setting forth the reasons why they

could neither admit nor deny the matters truthfully (CPLR § 3123[a]). Nevertheless, the court may at any time allow a party to amend or withdraw any admissions on such terms as may be just (CPLR § 3123[b]). Thus, the court may relieve defendants of their failure to respond to a notice to admit within the context of a summary judgment motion. The court will proceed to determine whether plaintiff has met its initial burden on summary judgment without the benefit of facts which were not a proper subject of a request for admissions.

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384, 2005). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers(Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 1986). To recover the "scheduled value" of an item of work on summary judgment, plaintiff must establish, prima facie, that the item was fully performed. To recover the "work completed" value for an unfinished item, plaintiff must establish prima facie that the figure represents the reasonable value of the work performed. Where the work completed figure does not agree with the scheduled value, plaintiff has clearly not established that the item of work was fully performed. The court will now consider whether, as to unfinished items, the architect's certificate is prima facie proof as to the reasonable value of the work performed.

"An alternate dispute resolution agreement, like an arbitration agreement, must be clear, explicit, and unequivocal" (*Thomas Crimmins Contracting Co. v. Cayuga Construction Co.*, 74 NY2d 166, 171, 1989). It may not depend upon implication or subtlety(Id). By explicit agreement, the parties to a construction contract may provide that disputes concerning the project will be resolved by an architect or engineer who is aligned with one of the parties(Id). The contract provides that the architect will be the owner's representative during construction and until final payment is due. The contract provides that, "Based upon applications for payment submitted to the architect by the contractor and certificates for payment issued by the architect, the owner will make progress payments on account of the contract sum to the contractor as provided below and elsewhere in the contract documents". The contract further provides that, "The issuance of a certificate for payment will constitute a representation by the architect to the owner, d

based on the architect's evaluation of the work and the data comprising the application for payment, that the work has progressed to the point indicated and that, to the best of the architect's knowledge, information, and belief, the quality of the work is in accordance with the contract documents". The court concludes that the contract does not explicitly provide that disputes concerning payment will be resolved by the architect. Therefore, the architect's certificate for payment is not binding upon the owner of the project.

While not binding upon the owner, an architect's certificate has been held to be prima facie evidence of its contents (*Franklinville Realty Co. v. Arnold Construction Co.*, 132 F.2d 828, 5<sup>th</sup> Cir. 1943). Nonetheless, because the architect's certificate for payment no. 3 is unsworn, it cannot constitute prima facie proof on this summary judgment motion (*Rupp v. Port Jervis*, 10 AD3d 391, 2<sup>nd</sup> Dept., 2004). The court concludes that plaintiff has not established prima facie entitlement to judgment as to any item of work for which the work completed value has been disputed by defendants. Finally, as to items of work for which the value of work completed has been conceded, plaintiff is still not entitled to judgment without prima facie proof that it has not been paid for the particular item. Plaintiff offers no proof that defendants did not direct that their payments be applied to the undisputed items (See *Snide v. Larrow*, 62 NY2d 633, 1984). Plaintiff's motion for partial judgment is **denied**.

This shall constitute the decision and order of the court.

Dated DEC 02 2008

*Stephen A. Bucaria*  
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J.S.C.

**ENTERED**

DEC 04 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE