

Arthur Lasky Architects v Birnbaum

2009 NY Slip Op 30124(U)

January 8, 2009

Supreme Court, New York County

Docket Number: 600003/2007

Judge: Louis B. York

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.

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

PRESENT: LOUIS B. YORK
J.S.C.

PART 2

Index Number : 600003/2007
ARTHUR LASKY ARCHITECTS
vs.
BIRNBAUM, EZBA
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JAN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/15/09

[Signature]
LOUIS B. YORK 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: IAS PART 2

-----x

ARTHUR LASKY ARCHITECTS,

Plaintiff,

-against-

EZRA BIRNBAUM and CAROLINE BIRNBAUM,

Defendants.

-----x

Index No. 600003/2007

FILED
JAN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

This is a breach of contract action by plaintiff Arthur Lasky Architects against defendants Ezra and Caroline Birnbaum (hereinafter "defendants" or "Owner") demanding payment for fees charged at an hourly rate, and the interest related thereto, for work done by plaintiff at defendants' residence. Defendants now move, pursuant to CPLR §3212, for summary judgment, dismissing plaintiff's complaint to the extent plaintiffs make the above-stated demands.

II. Facts

On or about April 7, 2003, plaintiff prepared and entered into a written contract ("Contract") with defendants to provide architectural services in connection with the renovation of defendants' personal residence at the construction budget of \$500,000.00. The Contract provided that plaintiff's fee was to be calculated as 15% of the cost of construction, and the defendants were to be billed monthly based on plaintiff's progress according to a schedule assigning a percentage of the fee to each of five phases set out in the Contract.

Also included in the Contract was a clause titled "Additional Services." This clause provided that when the defendants requested certain services which were not already accounted for in the Contract, the services shall be provided, "*if authorized by Owner in writing*, and they shall be paid for by the Owner in accordance with the Schedule of Hourly Rates," as listed in the Contract. (emphasis added)

The services at issue in this case are Interior Design Services and Revisions to Design, which both fall under the "Additional Services" category. The Contract states under "Revisions to Design" that:

All revisions to drawings, specifications or other documents made following the approval of any Design Development drawings, including revisions to the scope of the work, project scheduling or selected systems, or required by enactment or revisions to codes, laws and regulation subsequent to such approvals, shall be compensated in accordance with the Schedule of Hourly Rates. (Contract, at 3).

The services listed above are those with which defendants take issue. This is because plaintiff charged defendants hourly fees totaling \$34,918.75 which were billed under the category "Additional Services".

Defendants contend in their motion for summary judgment that plaintiff delivered an invoice to defendants in or around May 2004, which indicated that plaintiff estimated the cost of construction at \$800,000.00. This amount, according to the defendants, was well over the assumed budget for the project as specified in the Contract. After defendants received the invoice, they notified plaintiff that the project must be put on hold because they were unprepared and unwilling to proceed with the construction job at the increased cost. Months later, however, defendants realized that the construction job could be completed within the originally contemplated budget of \$500,000, as was

agreed to in the Contract, and they contacted plaintiff to make another attempt to provide acceptable architectural plans that would meet defendants' desired budget.

In his affidavit, defendant Mr. Birnbaum claims that he requested plaintiff's services for a second time because plaintiff had already begun the project and defendants had already paid him a substantial amount of money. Again, defendants contend that even at this point, they never gave plaintiff any written authorization to perform any "Additional Services", or to be billed at an hourly rate.

On or around May 3, 2005, plaintiff sent defendants a letter which indicated that he was changing the terms of the agreement and that he would have to bill defendants on an hourly basis. Defendants, however, responded that they were terminating plaintiff's services since they were not in agreement to the terms. When plaintiff's services were terminated, he sent defendants an invoice billing them for his "Additional Services" under the Contract, charging defendants total hourly fees of \$34,918.75, as stated above.

Pursuant to the Contract, defendants paid plaintiff a retainer in the amount of \$15,000.00 in April 2003, which was to be credited against services rendered, and at this point continue to refuse to pay plaintiff the \$34,918.75 he demands.

III. Discussion

As stated, defendants currently move for summary judgment, dismissing plaintiff's complaint as to the portion demanding fees for additional services performed at plaintiff's hourly rate. A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, "tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med.

Ctr., 64 NY2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 NY2d 1065 (1979). Once met, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v. City of New York, 49 NY2d 557 (1980).

This action is based on a Contract that expressly requires written authorization for "Additional Services" and also provides that only these Additional Services can be charged at hourly rates. Defendants contend that because there is no genuine issue of fact as to whether written authorization for the Additional Services was given or exists, since both plaintiff and defendants concede that no written authorization has been given, summary judgment should be granted as a matter of law in favor of defendants with respect to the charges for the hourly rates totaling \$34,918.75, and interest related thereto.

Although plaintiff is suing for hourly fees for additional services performed, in his deposition, he maintains that pursuant to the Contract, any "Additional Services" would only be performed after they were authorized *in writing* by the owner. After discussing the services listed under "Additional Services," plaintiff responded to questioning:

Q: These are all additional services, is that correct?

A: Under this proposal, all of these were listed as additional services.

Q: They would be in your view viewed as additional services, correct?

A: Under this proposal all of those were listed as additional services.

Q: So in your view, as of January of '03, these would be constituting additional services, correct?

A: This is an unsigned proposal. This unsigned proposal contemplates those being listed as additional services.

Q: These additional services would have been authorized by the owner in writing, correct?

A: Under this proposal, I have read to you what it says. That's what the proposal asks for.

[* * *]¹

A: This proposal asks for additional services and said they should be authorized by the owner in writing, although I do see at the end it says "unless otherwise noted."

[* * *]

A: My understanding was that he was going to pay me for my time.

Q: What was your understanding based on?

A: That he said "Go ahead and do the work."

Q: And "I will pay you"?

A: I don't remember if those were his exact words. He knew what I said and what I wanted and I went out and did the work.

Q: How do you know he understood what you said?

A: That was my assumption.

[* * *]

Q: So at that point did you enter into a written agreement with Mr. Birnbaum saying "I will do the work and you will pay me money"?

A: As I told you earlier, Mr. Birnbaum generally did not communicate his

¹ Intervening questions have been omitted to include only relevant deposition testimony.

decisions in writing.

Since it is clear that no writing exists to authorize the additional work, plaintiff is not entitled to his requested fees pursuant to the Contract because it would violate the terms of the Contract. In the 1st Department case of Emerman v. City of New York, the Court dismissed the case in which written authorization required by the contract was unavailable. The Court held that the written authorization was clearly required, and could not be circumvented by an oral authorization. Emerman v. City of New York, 34 A.D.2d 901, 312 N.Y.S.2d 288 (1970). According to the terms of the Contract, as stated, "Additional Services" could only be billed based on written authorization by defendants.

Furthermore, plaintiff has admitted that no writing exists; thus, it does not appear that plaintiff is authorized to receive payment for "Additional Services." In plaintiff's deposition, he not only stated that "virtually all communications with the Birnbaums were orally," but he reiterated this fact when questioned:

Q: Do you have any letters or e-mails or any written communications from the Birnbaums suggesting changes to you to be made to designs?

[* * *]

A: As I said earlier, I believe that the Birnbaums communicated verbally. Either that was at meetings or in phone calls. And the meetings at their house were over the drawings which would include models. Sometimes they pointed. Occasionally, I think

Ezra might have marked on some tracing paper that we had, but our communications were that way.

Thus, it is clear that since there are no genuine issues of fact in this case which preclude the granting of summary judgment on behalf of defendants, plaintiff is not entitled to a fee based on hourly rates.

Accordingly, it is

ORDERED that defendants' motion for partial summary judgment is granted; and it is further

ORDERED that the claim for fees charged at hourly rates in the sum of \$34,918.75 is severed and dismissed.

The Court has considered plaintiff's other arguments and finds them to be without merit.

The action shall continue with plaintiff's claim for the balance of the money sued for by plaintiff.

FILED

JAN 22 2009

SO ORDERED:

COUNTY CLERK'S OFFICE
NEW YORK

DATED: 1/16/09

ly

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

LOUIS B. YORK
J.S.C.