Marshall v Everett Constr. Co., LLC

2009 NY Slip Op 30600(U)

March 16, 2009

Supreme Court, New York County

Docket Number: 604342/05

Judge: Michael D. Stallman

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SCANNED ON 3/20/2009

[* 1]

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

PART 7

Index Number : 604342/2005

MARSHALL, JEREMY

VS.

EVERETT CONSTRUCTION

SEQUENCE NUMBER : 009

SUMMARY JUDGMENT

stice

INDEX NO. _____

MOTION DATE 8/22/08

MOTION SEQ. NO. 09

MOTION CAL. NO. 24

ad on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-P	1-2
Answering Affidavits — Exhibits A-Q + memo of law	3-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum Decision and Order.

FILED
MAR 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

Dated: 3/16/09

J.S.C.

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

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 7

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JEREMY MARSHALL and JENNIFER MARSHALL,

Plaintiffs,

-against-

Index No. 604342/05

Decision and Order

EVERETT CONSTRUCTION COMPANY, LLC,

Defendant.

----------X

FILED
MAR 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.:

In this case, plaintiffs, who are homeowners, seek damages from defendant, a contractor, alleging that defendant performed shoddy renovation work that required repair, overbilled for work it claimed to, but did not, perform, and walked off the job midstream. Defendant moves for summary judgment in its favor, pursuant to CPLR 3212, dismissing the complaint.

Background

It is undisputed that defendant worked on a construction project involving two apartments owned by plaintiffs. At a certain point in the project, plaintiffs stopped payment on two payment checks and defendant stopped work. The parties dispute which event occurred first, and why. In addition, plaintiffs allege that defendant's work was shoddy and defective, not done in a good and worker-like manner, and done with inferior, unsuitable and defective materials. On a prior motion, this court dismissed defendant's payment counterclaim because defendant was not licensed by the New York City Department of Consumer Affairs as a home improvement contractor when it performed work for plaintiffs.

Defendant argues that summary judgment should be granted in its favor because plaintiffs

have not met their burden of proof, only assert general and conclusory breach of contract allegations, and did not sign the contract upon which they rely. Defendant also contends that it is entitled to summary judgment because it only billed plaintiffs for work actually performed, there is no competent proof that defendant performed shoddy and defective work, and plaintiffs have not served expert witness disclosure.

Analysis

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To the extent that defendant appears to argue that plaintiffs do not have evidence to warrant trial, defendant may not obtain summary judgment. In addition to the conclusory nature of this assertion, a movant on summary judgment may not obtain judgment merely by pointing to gaps in the non-moving party's case (*Falah v Stop & Shop Cos., Inc.*, 41 AD3d 638, 639 [2d Dept 2007]).

Defendant claims that it is entitled to summary judgment because plaintiffs' amended claim for breach of contract is predicated on a signed AIA agreement when there is no dispute that there is no signed agreement (Pl. Mov. Aff., Exh. H, at 146). Plaintiffs oppose the motion, arguing that summary judgment is not warranted because the parties agreed to be bound by the terms of a written AIA contract.

An unsigned contract may be enforceable where there is objective evidence demonstrating that the parties intended to be bound (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 370-371 [2005]). Anthony Piscionere, a managing member of defendant, submitted an affidavit earlier in this case, which plaintiffs submit here, stating that "plaintiffs agreed to pay [defendant] a total fee of $551,000.00 for all work, labor, services and material for the renovation project, exclusive of change orders" (Pl. Op. Aff., at Exh. N, ¶ 3). Other record evidence, including the deposition testimony of Piscionere, may be fairly understood as indicating that the parties agreed that defendant would perform certain work for a certain price within a specific time period (*see e.g.* Pl. Op. Aff., Exh. M, at 51-52).[1] In fact, defendant's counsel states that there is no dispute that the agreed upon price for the work was $551,000.00, plus additional sums for change orders, from which can be drawn an inference that there was a scope of work to which the parties agreed. Plaintiff Jeremy Marshall (Marshall) also avers that defendant agreed to perform the renovation for $551,000 in accordance with plans and specifications delivered to it[2]. Consequently, summary judgment must be denied, as there is a fact issue as to the parties' intent to be bound by a written AIA contract that they exchanged but did not sign. The parties' disputes about the cause of delays and the scope of the agreement, with defendant arguing that the renovation project was not, as Marshall contends, a gut

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[1]In defendant's counsel's affirmation he speaks of Piscionere's testimony about the percentage of the construction project that Piscionere considered complete (Allegretti Aff., ¶ 23). A jury might infer from such testimony that there was a defined scope of work from which Piscionere derived the percentage of completed work.

[2]While defendant's counsel, citing to Marshall's deposition testimony, states that Marshall, at his deposition, was unable to state which version of the proposed agreements was the final version, Marshall's testimony was that he was not 100% sure about whether several pages of a document presented to him there were part of the final version of the contract, and that he could not tell from recollection there, or in the context in which the documents were presented (*see* Pl. Moving Aff., Exh. H, at 41-44).

renovation, do not lend themselves to summary disposition.

Defendant claims that it is entitled to summary judgment because plaintiffs' architect approved, or did not disapprove, payment applications that defendant submitted for work performed. Specifically, defendant states that as construction progressed it submitted to plaintiffs or their architect payment applications (Payment Application), which included a spreadsheet that detailed the percentage of work performed for various portions of the project for the billing period. Defendant includes copies of the Payment Applications. Plaintiffs do not dispute defendant's contention that they paid, in full, the first seven Payment Applications without objection.

While there is legal support for the premise that acceptance of performance under a construction contract is a waiver of the right to recover for known or patent defects (*Yeshiva Univ. v Fidelity & Deposit Co. of Md.*, 116 AD2d 49 [1st Dept 1986]), what defendant asks is that the court make numerous factual determinations concerning plaintiffs' allegations about the various problems and defects with the defendant's work, where defendant did not do so as part of its moving burden, as is required on summary judgment. For many of the construction defects that plaintiffs allege, the court could not determine as a matter of law that they were patent or unknown. In fact, defendant did not point to evidence to support its contention that the architect was plaintiffs' agent, as its attorney contends. Defendant's reply papers, in which Piscionere disputes Marshall's contentions about the defects, does not resolve, but highlights, that the record is replete with disputed fact issues.

Defendant asserts that it is entitled to summary judgment because plaintiffs breached the parties' agreement by stopping payment on two checks without reason when neither plaintiffs nor their architect claimed that defendant was in breach of the construction contract (Allegretti Aff., ¶ 21-23). Defendant argues that plaintiffs' act in stopping payment on the checks, and their complaints

about defective work, are based merely on Marshall's lay opinion and belief that the project was not 50% complete, but that he was being billed for more than 50% of it. To support this contention, defendant offers Piscionere's testimony that Marshall did not understand how defendant made Payment Applications, processed change orders, and gave credits. Plaintiffs oppose the motion, with Marshall averring that plaintiffs did not stop payment on the checks before defendant unilaterally announced that it would perform no further work on the project, and that he was informed of defendant's "abandonment" of the project prior to the issuance of the stop payment orders (Marshall Aff., ¶¶ 47-49).

In support of its contentions about plaintiffs' stopping payment, defendant submits its counsel's affidavit and Piscionere's unsupported conclusion about Marshall's lack of understanding about Payment Applications. The proponent of a summary judgment motion may not establish its prima facie burden on mere conclusion, however, but must submit admissible evidence eliminating material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005] [finding supporting affidavit insufficient because it was made by a person without personal knowledge]). In any event, plaintiffs have raised a fact question as to anticipatory breach that cannot be resolved here.

In support of its argument that plaintiffs' complaints about the work quality amount to nothing more than Marshall's dissatisfaction that the project was not finished when difficulties between the parties arose, defendant also offers Piscionere's testimony that Marshall was laboring under mistaken beliefs about Payment Applications, and the assertion that delays were caused by plaintiffs not timely selecting project materials. Plaintiffs' bill of particulars lists as defective or shoddy work the following:

> "walls out of plumb, defective cabinetry, 2d floor hallway flooring, 3rd floor landing flooring, site protection, water leakage, framing, window enclosures, flooring, master bathroom vanity and medicine cabinet, relocation of duct work over shower door, removal and re-installation of bathroom tile, door jamb installation throughout, improper number/location of smoke detectors, failure to obtain electrical and plumbing permits before starting work and closing and tiling over walls before having electrical and plumbing work inspected; incomplete/partial installation of recessed lighting fixtures, pocket doors built without track and with holes drilled inside rendering them unusable"

(Def. Op. Aff., Exh. J ¶ 4). As the movant on summary judgment, defendant is required to eliminate material issues of fact with the submission of admissible evidence. Defendant has not done so where it does not submit non-conclusory admissible evidence to demonstrate that plaintiffs' defective work complaint is unfounded. To the extent that defendant may be attempting to use as expert opinion Piscionere's testimony about Marshall's understanding of Payment Applications, Piscionere has not stated the basis for his conclusion, as is required where expert testimony is offered (*see Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006]).

In addition, Marshall testified to problems with the work, such as plumbing that was not properly hooked up, cabinetry that was not correctly installed, walls that were not plumb and problems with the chimney not being supported that were later repaired by another contractor (Pl. Op. Aff., Exh. K, at 173-196), and submits an affidavit describing what he contends are defects. Plaintiffs also submit the affidavit of the Terry Prelorentzos, who avers that he is the president of Great Interiors Renovations (G&I),[3] the company that performed work on plaintiffs' home after defendant discontinued its work. Prelorentzos further avers that he viewed defendant's work and that numerous aspects of it were performed in a shoddy and defective manner, and had to be repaired by G&I and others. Prelorentzos states that Marshall's affidavit accurately describes

[3]Prelorentzos states that G&I was previously known as G&I Construction Corp.

both the defects and the corrective measures taken to remedy them. He further states that approximately $134,000 of the $458,134 initially billed by G&I under its agreement with plaintiffs represented the cost of completing work that defendant was to perform in accordance with the renovation plans, but did not, and for repairing shoddy and defective work that defendant performed on the project. These submissions raise an issue of fact for trial.

Defendant also contends that it is entitled to summary judgment because plaintiffs served no expert response. To the extent that this contention would serve as a valid basis for summary judgment, defendant is not entitled to such relief as it has not demonstrated that it served a request for such a response (*see* CPLR 3101 [d]).

Defendant asserts that it is entitled to summary judgment because it did not overbill. Whether plaintiffs were overbilled by defendant is not resolved by Piscionere's unsupported testimony, in which he merely concludes that a certain percentage of the work was completed. Defendant fares no better with its submission of a video of the site and its assertion that the video demonstrates that a certain percentage of the project was completed. On summary judgment, the court is charged with identifying disputed fact issues, not making determinations about them (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), and may not assess whether the video demonstrates that defendant completed a certain percentage of work.

In any event, in opposition, Marshall's detailed affidavit, with invoices, concerning payments he claims plaintiffs were billed for and made to defendant for work that defendant did not perform and/or materials either not purchased or delivered to the job site, raises an issue of fact about overbilling. Whether the $104,767.29 that Marshall claims that plaintiffs spent for materials is, as defendant proposes, due to plaintiffs having exceeded the contract

estimate/allowance, is not subject to disposition here, but simply another disputed fact. That plaintiffs did not submit proof that they paid the invoices that they submitted does not render those invoices insufficient to raise an issue of fact as to whether plaintiffs were caused to incur expenses due to defendant's defective work. Furthermore, even if, as defendant contents, a portion of the work done by plaintiffs' new contractors was unrelated to the work done by defendant, this would not resolve issues concerning plaintiffs' complaints about the work that defendant did perform. Plaintiffs need not prove their case here, as defendant appears to imply, and defendant may not succeed on this motion merely by attempting to show that plaintiffs may incur difficulty meeting their trial burden.

Defendant makes numerous, often conclusory, arguments for the first time only on reply, which is impermissible (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] ["The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion"]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]). Therefore, these reply arguments will not be addressed and include: (1) that plaintiffs did not mitigate damages; (2) that had there been problems with the quality or the percentage of work performed there would have been documentation from the architect; (3) that there is no way to determine whether the scope of work performed by the new contractor was the same as that which the parties agreed defendant would do; (4) that defendant was ready, willing and able to continue the project so long as plaintiffs replaced the checks on which they stopped payment; and (5) that the delays were caused by plaintiffs in that they decided to order and purchase certain of their own materials and appliances and spent over the contract allowance. As to the last

argument, to the extent that defendant may have raised the issue of delays in its initial submission, it did not sufficiently eliminate material issues of fact.

Defendant's additional arguments disputing plaintiffs' opposition about, among other things, framing problems, the material used in the sub-floor, and compliance with the construction plans, must await trial, as the court cannot make judgments about these factual issues as a matter of law. Also for a jury to consider is defendant's contention about plaintiffs' "fuzzy math" not adding up (Piscionere Reply Aff., ¶ 7).

Finally, defendant points to several items that it claims that plaintiffs did not provide during discovery. Defendant does not request relief, however, for what it contends was plaintiffs' withholding of discovery, and also does not demonstrate that it demanded these items from plaintiffs.

Conclusion

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is denied.

Dated: March 16, 2009
New York, New York

ENTER:

J.S.C.

FILED
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