MEMORANDUM

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

MAGNUM HOLDINGS, INC. and SAM SIMANI,

Plaintiffs,

INDEX NO.: 018389/2007

-against-

DECISION AFTER TRIAL

ELDAN CONSTRUCTION CORP. and
DANIEL J. MENDELSOHN,

Defendants.

This action arises out of the construction of a sizeable single-family dwelling. Plaintiffs Magnum Holdings, Inc. (referred to herein as "Magnum") and Sam Simani (referred to herein as "Simani") were the owners of a certain parcel of land, located at 50 Saddle Lane in Roslyn Heights, New York. Magnum's business operation consisted of purchasing real property, demolishing any existing structures, erecting a new structure and re-selling the property. Defendants Eldan Construction Corporation (referred to herein as "Eldan") and Dan Mendelsohn (referred to herein as "Mendelsohn") were engaged in the business of construction. Mendelsohn was the President and Shareholder of Eldan Corporation.

The parties executed a "Standard Form of Agreement Between Owner and Contractor" (referred to herein as "the Contract", Plaintiffs' Exhibit 2) dated November 4, 2005. Eldan agreed to erect a residential dwelling according to certain plans and specifications for consideration in the sum of seven hundred and thirty five thousand dollars ($ 735,000.00) to be paid in installments. The Contract was a standard form endorsed by the American Institute of Architects (referred to herein as "AIA"). The Contract's preamble expressly incorporates by reference AIA Document A201, entitled "General Conditions of the Contract for Construction".

(Trial Exhibit "TT"). Additionally, the Contract's preamble recommends consultation with an attorney prior to its execution. Neither party commissioned the services of an attorney although the Contract spanned eight pages, incorporated other documents by reference, and involved a substantial dollar amount.

Construction commenced in a timely manner and installment payments were made. Unfortunately, difficulties with the construction emerged quickly after the outset of the project. Following commencement of work, the Town of North Hempstead discovered that the foundation, as excavated and formed, exceeded the permissible height for a new basement. Additionally, it was discovered that the roof exposure (or "plane"), as called for in the first set of plans, did not conform to the applicable building code. A "Cease and Desist Order" was issued on July 19th, 2006. (Plaintiffs' Trial Exhibit Y, pg. 2). (These problems coincided with the discovery of certain irregularities having been unearthed in the Town of Hempstead Building Department).

In April of 2007 the Town of North Hempstead approved a revised set of plans. (Trial Exhibit 54). Thereafter, on June 11, 2007, with the aid of counsel on both sides the parties executed a "Modification Agreement" (herein referred to as the "Modification") that was the result of "7 hours torturous unfair negotiation" according to Mendelsohn. (Defendants' Exhibit "Y", pg. 3 ¶ 4). The Modification contained several provisions relating to indemnification, timing of performance, and the requirement that Magnum furnish updated plans to Eldan. While the original Contract price remained unchanged, further payments to Eldan were to be made on certain days based on work accomplished. Up to this point, four hundred thousand dollars had been paid. In addition, paragraph 7 of the Modification, which appears directly above the signature lines, explicitly provides that the provisions of the original Contract remain in full effect notwithstanding those changed by the Modification. Simani and Mendelsohn both signed the Modification on behalf of their respective organizations and in their individual capacities.

The parties' agreement to continue the project was short lived. Within three months of the modification, on August 24, 2007 Simani wrote to Mendelsohn. (Plaintiff's Trial Exhibit "8"). The letter enumerated several items of construction that remained incomplete although called for completion under the Modification. Finally the tension culminated in Simani's letter

of September 5, 2007 that made reference to the letter of August 24, and noticed the termination of Mendelsohn and Eldan, to take effect on September 13, 2007. (Plaintiff's Trial Exhibit "10").

Following termination of the parties' agreement, the plaintiff's hired Robert Daly (hereinafter referred to as "Daly") as their "Construction Manager." Daly performed an initial assessment of the construction and undertook to arrange for completion of the project. In furtherance of the project Daly had the authority to hire subcontractors to complete necessary work. Several of the subcontractors Daly ultimately chose had in fact been the very companies retained by Eldan on the very same site for the very same purposes.

The 1987 version of AIA document A201, which was incorporated by reference into the Contract, expressly provides the requisite steps to be taken in order to terminate the Contract. The relevant provision of Article 14.2, entitled "Termination by the owner for cause", is reproduced below as it bears directly upon the issues in this case:

> 14.2.2 When any of the above reasons exists, the Owner, *upon certification by the Architect* that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor...

(Emphasis added, AIA Document A201-1987, Fourteenth Edition, pg. 23; Defendants' Exhibit "TT"). By comparison, the Plaintiffs introduced a different version of AIA document A201 that it averred superseded the defendants' exhibit. The relevant portion of that Article 14.2.2 reads:

> When any of the above reasons exist, the Owner, upon certification by the ~~Architect~~ Initial Decision Maker that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor...

(Strikethrough and underlining in original, AIA Document A201 – 1997/2007 Comparative, 2007, pg. 31; Plaintiffs' Exhibit 55).

I.

As previously noted, *supra*, the Contract between the parties incorporated by reference the 1987 Edition of AIA Document A201, General Conditions of the Contract for Construction.

Because the Contract between the parties and the subsequent Modification agreement was executed after the 1997 Edition of AIA Document A201 had been released, the plaintiff devotes much effort in order to have the 1997 version apply. However, as will be discussed more fully below, this Court finds there is no relevant difference between the two versions.

At trial the defendant introduced exhibit "TT", which was AIA Document A201, "1987 Edition" that included article 14.2 reproduced, *supra*. This article provided that an owner must obtain certification by the architect prior to terminating the Contract. In this regard, both parties agree that such certification was not obtained and Simani unilaterally terminated the Contract, effective September 13, 2007, upon its own initiative and determination. In response the plaintiff introduced what he declared was the 1997 version of AIA Document A201 as Plaintiff's trial exhibit "55". Plaintiff averred that substantial changes to the 1987 version permitted him to terminate the contract without certification of an architect.[1]

Although both parties in their post-trial memoranda acknowledge plaintiff's trial exhibit "55" as those General Conditions that became effective in 1997 this Court finds otherwise. Plaintiff's exhibit "55" is entitled "AIA Document Comparative", subtitled "A201 – 2007 *Compared to* A201 – 1997" (emphasis added). Furthermore the most recent copyright date as printed on the cover page is 2007. From this it is readily apparent that plaintiff's exhibit "55" is a document issued by the AIA which underlined additions to the 1997 edition and indicated deletions from the 1997 edition via strikethrough text. That "Architect" appears as strikethrough text while "Initial Decision Maker" is underlined in article 14.2.2 of Plaintiff's Exhibit "55" is of no consequence. Those changes that appear in the Comparative were not effective as of the 1997 A201 General Conditions document but rather were modifications that took effect on or about 2007. Accordingly, this Court finds that under either version of document A201 (1987 or 1997), the architect was required to certify that sufficient cause existed to terminate the Contract.

This Court is aware of two occasion in which the Court of Appeals has examined the General Conditions of the Contract for Construction of the AIA. See Liebhafsky v. Comstruct

[1] Eldan was not the project's Architect. Rudolph Shatarah was the Architect, as called for under the Contract. Simani elected not to bring Mr. Shatarah back onto the job, despite the fact that Mr. Shatarah often spent time at Simani's mother's real estate brokerage office.

Associates, Inc., 62 N.Y.2d 439, 440 [1984]; see also County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1 [1980]. In Primiano the Court held that "under the 'General Conditions', the 'authority of the architect is centered on the operational phases of construction' and thus a 'claim ... for delay damages, asserted some two years after substantial completion of the project and occupation of the building' need not be submitted to the architect as a condition precedent to arbitration." Id. Whereas in Liebhafsky the architects supervisory duties were relieved becase the contractor substantially violated the terms of the contract." Liebhafsky v. Comstruct Associates, Inc., 62 N.Y.2d 439, 440 [1984]. Accordingly, this case is distinguishable from both results.

The plaintiff speculates as to those reasons that prompted the AIA to modify document A201 General Conditions replacing Architect with Initial Decision maker. In essence, the plaintiff argues the realization that typically, "architects...[are] not involved in the overseeing of the construction project..." such as one family homes. (Plaintiff's Post-trial brief, pg 6). While plausible, the plaintiffs conjecture is dispelled by the AIA's own commentary on the substantive change that clearly counters the plaintiffs assertion:

> "The term Initial Decision Maker refers to an individual or entity that will be responsible for providing initial decisions on claims between the owner and the contractor during the course of the project and certifying termination of the agreement. The architect has traditionally performed this service. In A201–2007, however, it is possible for another individual or entity to hold that position. In the AIA's 2007 owner-contractor agreements that incorporate A201–2007, the owner and the contractor have the option to name a third party initial decision maker. *If the owner and the contractor do not identify a third party as the initial decision maker, the architect will serve in that role, as it has traditionally.*"

Emphasis added, AIA Document A201 – 2007 Commentary, pg. 5 (2007). The commentary goes on to state:

> "The initial decision maker must decide if sufficient cause exists to terminate the contract with the contractor. *This servers to protect the contractor against unreasonable action by the owner and serves to protect the owner from the consequences of acting prematurely.*"

Emphasis Added. Id. at pg. 53.

"Generally, where parties agree on a termination procedure, the clause must be enforced as written." J. Petrocelli Const., Inc. v. Realm Elec. Contractors, Inc., 15 A.D.3d 444, 446, 790 N.Y.S.2d 197, 199 (2nd Dept. 2005) citing A.S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 382, 165 N.Y.S.2d 475, 144 N.E.2d 371. "Nevertheless, '[o]nce it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts, such as conditions precedent.'" Id. at 446 citing (Allbrand Discount Liqs., Inc. v. Times Sq. Stores Corp., 60 A.D.2d 568, 399 N.Y.S.2d 700; accord Oak Bee Corp. v. Blankman & Co., 154 A.D.2d 3, 8, 551 N.Y.S.2d 559).

The language of AIA Document A201 is unmistakably clear. It requires certification of an architect that cause exists for termination. This action was required under either proffered version of Document A201. Additionally, the AIA has made clear the reasons giving rise to the change from Architect to Initial Decision Maker. This Court was aware at trial that plaintiff never even contemplated the existence of Article 14.2.2. The testimony proffered at trial established that Mr. Shatarah was in regular contact with the plaintiff's mother throughout the project (albeit without regard to the underlying project). Moreover, the necessity for a revised set of plans to lift the cease and desist order required an architect to revise the original set of plans. Whether or not this was Mr. Shatarah is unclear, in any event, the involvement of an architect was required beyond the pre-construction stage. Under the rule of Petrocelli and the foregoing discussion, the Court finds that plaintiff's obligation was not relieved due to any perceived lack of daily involvement by the Architect.

Having found that the termination clause under either the 1987 or 1997 General Conditions remained unchanged. And upon the reasoning above that incorporates the AIA's own commentary on the new role of Initial Decision Maker. And giving due consideration to all else this Court finds that the plaintiff wrongfully terminated the Contract and Modification Agreement.

II.

Notwithstanding the foregoing discussion, if the Court were to find that the plaintiffs had properly terminated the Contract they would still be required to prove those damages that were allegedly incurred as a result of defendants' defective performance. The elements of a cause of action for breach of contract are; 1) formation of a contract between the parties, 2) performance

by the plaintiff, 3) defendant's breach, and 4) resulting damage. Furia v. Furia, 116 A.D.2d 694 [2nd Dept. 1986]; Noise in Attic Productions, Inc. v. London Records, 10 AD3d 303 [1st Dept. 2004].

The Second Department has explained that "[t]he proper measure of damages where a contractor fails to complete performance due under a contract is the difference between the contract price and the cost of completing the work left undone. Al-Ev Const. Corp. v. Ahern Maintenance & Supply Corp., 141 A.D.2d 591, 529 N.Y.S.2d 354 [2nd Dept. 1988]. However, as the Al-Ev Court noted, "practically the rule of damages is more clearly and appropriately stated to be the difference between the amount remaining due and owing under the original agreement and the actual cost of completing the work required by the contract." Id. In other words, to use a stark example, if a homeowner has paid $100,000 towards the amount due under a $200,000 home improvement contract, and the cost to complete construction after the contractor walked off was $100,000, any recovery by the homeowner would be limited merely to nominal damages. Stated another way, the rule is thus; "the plaintiff is entitled to be compensated for the cost of completion of the construction work and the correction of defects in the defendants' work [citations omitted], the proper measure of damages is the "fair and reasonable market price for correcting the defective installation or completing the construction." Kaufman v. Le Curt Const. Corp., 196 A.D.2d 577, 578-579, 601 N.Y.S.2d 186, 188 [2nd Dept. 1993] citing Lukoff v. Sussex Downs, 131 A.D.2d 442, 443, 516 N.Y.S.2d 471 [2nd Dept. 1987].

As to damages, the plaintiff bears the "burden of proving the extent of the harm suffered" J. R. Loftus, Inc. v. White, 85 N.Y.2d 874, 877 [1995], citing Berley Indus. v City of New York, 45 N.Y.2d 683, 686 [1978]. "Damages are recoverable for losses caused...by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty." Haughey v. Belmont Quadrangle Drilling Corporation, 284 N.Y. 136 [1940]. Certainty "requires only that damages be capable of measurement based upon known reliable factors without undue speculation. Ashland Management Inc. v. Janien, 82 N.Y.2d 395, 403 [1993], citing Restatement [Second] of Contracts § 352.

Defendant's reliance on Tishman Construction Corp. v. City of New York for the proposition that wrongful termination precludes recovery for defective performance is misplaced. Tishman Construction Corp. v. City of New York, 228 A.D.2d 292 [1st Dept. 1996].

In that case the defendant had at least two options for terminating the contract. Id. Under the course defendant chose, in compliance with the written contract, the "termination for convenience" clause did not provide for recouping the expense of curing plaintiff's default whereas the alternative termination clause did provide for such expenses.

Plaintiff seeks to recover "additional interest charges of $ 141,384.66". The testimony of Mr. Simani revealed that these charges were incident to debt incurred to finish the project. As defendant correctly points out, the plaintiff would have incurred these expenses had he fulfilled his payment obligations under the Contract and Modification. The plaintiff did not put any evidence forth to establish how these interest charges flowed from the alleged breach of the defendant.

The plaintiff also seeks to recover for "reduction in selling price as a result of delay in completion of construction of $250,000.00". In support of its claim, the plaintiff put forth the testimony of Minoo Pajounia. Ms. Pajounia, the mother of Simani, is a real estate broker that targets those neighboring areas in and around the subject parcel. At the time of trial, she was not a certified real estate appraiser and failed to offer testimony concerning any lost profits occasioned by a delay in the completion of construction, nor did she fix a price that which the property would have sold for at a specific date or even a range of dates. Ms. Pajounia's testimony concerning the sale prices of other homes it the area lacked a sufficient relationship to support the plaintiffs claim for damages. The plaintiff's claim, that the interest charges and reduced sales price were contemplated at the time the parties executed the Modification is unsupported by the record. In any event, evidence of contemporaneous discussions not reduced to writing is precluded by the parol evidence rule under the facts of this case.

The main thrust of the plaintiffs' action sought to recover damages for "Additional Construction Costs of $186,687.98. At trial the plaintiff offered extensive testimony by Simani concerning payments made to various tradesman and material suppliers. This evidence consisted of Magnum's checking account statements followed by handwritten tabulations of check numbers and amounts for each tradesman. All told, the plaintiff caused to be introduced payments to thirty-four different entities totaling $418,302.14.

In order to show the amount of its damages the plaintiff called its Construction Manager, Robert Daly to testify. In brief, Daly's background appears as follows; he began his career as a

Carpenter and ultimately attained a foreman position. Daly operated his own business, for a number of years between 1994 and 1999, which was engaged in mostly residential construction. He was also employed as a "basic" building inspector for the Town of North Hempstead between 2002 and 2007. Based upon the foregoing, this Court declined to accept Daly as an expert but permitted his layperson opinion.

As per the Al-Ev Court, the plaintiff may well be entitled to the difference between the amount owing to the contractor and the actual cost of completing the work required. In order to recover on these grounds it was incumbent upon the plaintiffs to fix a monetary amount with reasonable certainty. This Court cannot, without undue speculation, determine what monetary sums, if any, were dispersed to complete the project following Eldan's absence. The plaintiff's evidence did not enable this Court to determine, without pure conjecture, just what material and labor was obtained to complete the project as contemplated by the parties at the time of the Modification. As-built plans were not offered to show, with detail, what work was actually completed. The record did establish that changes to the project were routinely authorized and that subcontractors were paid but what the payments were for as compared to the work Eldan was to complete was not proven with any certainty.

The parties remaining contentions have been considered, however, in light of the foregoing, the Court finds it unnecessary to address them.

The Court finds the plaintiff did not validly terminate the defendant, pursuant to their agreement, and if he had terminated the defendant pursuant to the terms of the agreement, the Court would not have rendered a money judgment in favor of the plaintiff.

Submit Judgment on Notice.

Dated: December 8, 2009

J.S.C.