Concrete Structures v Pave-Co Indus.

2010 NY Slip Op 30107(U)

January 13, 2010

Supreme Court, Suffolk County

Docket Number: 33746-2006

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 33746-2006

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:
HON. EMILY PINES
J. S. C.

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CONCRETE STRUCTURES,

Plaintiff,

-against-

PAVE-CO INDUSTRIES,

Defendant.

---X

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DECISION AFTER TRAIL

This action involves a contractual dispute between two paving subcontractors, arising out of the method of placement of "brick pavers" on a condominium job construction site in Far Rockaway, Queens. The Plaintiff, Concrete Structures, Inc. ("Structures"), is suing the Defendant, Pave-Co Industries, Inc. ("Pave-Co") for $77,000, the amount allegedly due and owing Plaintiff for its labor, providing paving and Belgian block for the project, as Pave-Co's subcontractor. Pave-Co has asserted a counterclaim against the Plaintiff for $80,529.00, alleging that Pave-Co was forced by the owner at the job site to repair Structure's improper work at Pave-Co's own expense.

The matter was tried before the Court over three days in September, 2009. The Court heard the testimony of eight witnesses and received fifteen documents in evidence. At the suggestion of counsel for both parties, they stipulated to the appointment of an expert, post trial, to view the site, to determine whether Pave-Co had, in fact replaced the brick pavers as per the contract specifications. The allegations of the parties are as follows.

It is undisputed that the contract between the non-party owner of the project

and Pave-Co required that the contractor install brick pavers to the site and that such pavers were required to "(b)e set in dry pack cement". Plaintiff's 1. It is also undisputed that the pavers were not installed by Structures in dry pack cement and that many of them began cracking shortly after the installation . Finally, it is agreed that no change order was ever issued in writing, eliminating the requirement set forth in Plaintiff's 1. However, Plaintiff, through its President, Americo Magalhaes, testified that Structures was not originally given a contract with such specifications (Plaintiff's 2) and each of Plaintiff's witnesses avers that the decision was made by a group, including the owner, to forego the installation in dry pack cement. According to Mr. Goncalves, the supervisor for Structures on the job site, his company was required to install four areas of brick paving in the Winter of 2005-2006. He asserted that he believed that the pavers should have been installed in the dry pack but that they were unable to do so, since that would have required them to wait until the Spring and would have delayed the owner's ability to finalize its desired sale of the condominium units. As a result, he states that he had agreed, with Pave-Co's supervisor, William Matos, to forego the specification and to place pavers on concrete without a dry pack setting. He actually testified that he did not believe the job was done properly but that his company was given no choice. Ultimately, according to Goncalves, Structures left the job in the Winter of 2006, before Section 3 was completed and before Section 4 was started because the roadway was not ready for the completion of the paving work. He asserts that his company was never asked to return to complete the job and, although he admitted that he saw some broken bricks, he was never told that his company performed the job improperly. Identifying the invoices provided to the Defendant, he testified that Plaintiff was owed $77,507.20 based on its unit price contract for the labor performed. Plaintiff's 3 and Plaintiff's 4. According to Goncalves, he was unaware that Pave-Co claimed to have ripped out his company's work at the insistence of the owner and replaced it as per the specifications until this lawsuit. He claims to have viewed several of the pavers and based on such, does not believe that any remedial work was ever performed by the counterclaim Defendant.

Frank Matos, who asserted that he had been employed in 2005 as a supervisor for Pave-Co on the subject construction project, affirmed that Structures was hired to perform labor on the job, including the laying of pavers in dry pack cement. Matos testified that due to the cold weather and the owner's hurry in getting the homes occupied, the use of dry pack was eliminated since it would have required the installation to await the Spring season. Matos left the job site in December 2005. He

admitted that the requirement of setting the pavers in dry pack cement was, indeed, set forth in the contract specifications and stated that such requirement was added in order to prevent breakage of the pavers when subjected to traffic. He also testified on his original direct examination that he did not inform the President of Pave-Co, John Powell, that there had been a verbal modification of the specifications with the approval of the owner.

Peter Wicik, one of the project managers for the owner of the subject project testified that although the specifications called for the pavers to be placed in dry pack cement, a decision was made to abandon this requirement based on poor results from a pilot project since adherence to the specifications would result in the bricks popping up in the Winter. He did not see any reason why a written change was required and disagrees with the Plaintiff's argument that the modification was made due to the weather and time constraints. He could not say whether Pave-Co had been told to replace the pavers.

William Dymond, currently a co-owner of Pave-Co testified that although he was Matos' supervisor, Matos did not consult him concerning the so-called change in design. However, he learned on the job in early 2006 that almost all of the work performed by Structures had to be replaced due to cracking problems with the bricks. Dymond testified that Matos had no authority to authorize any changes in the work of Pave-Co's sub contractor without the approval of Pave-Co's president. He oversaw the repair work for Pave-Co , which retained another sub-contractor, Powell Paving and Masonry, to repair and replace almost all of Structure's work in sections 1 and 2. In addition, Pave-Co , through its subcontractor, completed the unfinished work in Sections 3 and 4. He testified that Pave-Co paid $55,529 to repair and replace what Structures had completed in Sections 2 and 3 (Defendant's B), and expended approximately another $29,000 to repair and replace Structure's paving work in Section 1 of the project. According to Dymond, Peter Wicik was fired from the owner's organization some time in 2006 or 2007.

John Powell, President of Pave-Co testified that his company's contract with Structures contained a specific requirement that the pavers be set in dry pack cement (Defendant's B) and that Structures was well aware of the requirement. He also asserted that Pave-Co supplied the sand and dry pack as required but that Structures simply failed to comply with job specifications. He testified that he was contacted by the owner as the pavers began to crack almost immediately following installation.

He insists his company was required to repair and replace the Plaintiff's work and affirmed the invoices set forth in Defendant's E as well as an additional $25,000 expended for the replacement and repair of the pavers in Section 1.

John Ryan, who has been a project manager of the owner organization for 14 ½ years testified under subpoena. He claims to that he was in a position to oversee the entire infrastructure of the Rockaway Beach project. According to Ryan, the owner never approved any changes to the specification that the pavers were to be set in dry pack cement. He actually saw the pavers cracking and discovered by lifting up the bricks that no embedment had been placed underneath. He asserts that he contacted William Dymond from Pave-Co, related the problem to him and they met with Goncalves to reiterate that the pavers had to be replaced properly. He testified that he required Pave-Co to return to the job and that he actually saw Pave-Co return to the site, remove the brick pavers and place sand underneath. He testified that the remediation work was done properly. He claims he never saw Structures return to the job to replace its faulty work.

Plaintiff's 1, the contract between the Defendant and Pave-Co contains the typical clause found in many construction contracts, stating that all changes in the work, including deletions, must be set forth in writing. Even emergency changes, which can be made in an expedited manner by the owner, must be set forth in writing. Plaintiff's 1, section 12. That contract also specially requires any of Pave-Co's subcontractors to be bound by the contract terms. Plaintiff's 1, section 16.12.

In pertinent part, the contract between Pave-Co and the owner, which by its terms is incorporated in the agreement between Pave-Co and Structures states as follows:

> "12.01 Contractor, without invalidating or abandoning this Agreement, may at any time require changes in the Work consisting of additions, deletions or other revisions. All such required changes in the Work shall be requested in writing and shall be submitted to Subcontractor, in order to be deemed part of, or deleted from, the Work. . . . ."

There is no dispute, in this case that Structure's paving work was required to be placed in dry pack cement and that this "deletion" occurred without any written

change order from the owner or any writing whatsoever from Pave-Co or Structures. There is also no dispute that immediately after installation, the pavers began to crack. The Court found credible the testimony of disinterested witness Ryan, who stated that no change was ever authorized. This makes sense in light of the credible testimony of Mr. Goncalves that laying of the pavers without a support material was a mistake. While Mr. Matos may well have acquiesced in the decision by Structures, he was clearly without authority to do so by either William Dymond or John Powell. The testimony of Peter Wicik is simply not supported by any other witness, including the Plaintiffs who called him. While he opined that the dry pack cement was not necessary because the road was a "private" one, his testimony ignores the obvious issue of the filed site plan which required dry pack cement as well as the paver manufacturer, which refused to honor any warranty from cracking because the pavers had not been set in proper fashion.

A written agreement should be enforced according to its terms; and clauses in construction contracts, requiring that changes be set forth in writing are generally enforceable. **See, Driscoll Masonry Restoration v County of Ulster,** 40 AD 3d 1289, 836 NYS 2d 362 (3d Dep't 2007).

There is a body of law in this State which permits a contractor to sue for work performed despite the lack of a required written change order; however, such is authorized in those cases where the contractor can demonstrate a course of conduct over a period of contract dealings with the performing party in which such additions or deletions were verbally authorized and the work continued and was compensated as verbally agreed. **See, Universal/MMEC LTD v Dormitory Authority,** 50 AD 3d 352, 856 NYS 2d 560 (1st Dep't 2008). Such a course of conduct was clearly not present in this case. Here, the Court finds, based on its determination of the credibility of the parties testifying, that Structures' employees decided not to utilize the dry pack cement despite the fact that it had been supplied to the site by Pave-Co, because it was simply too cold and would have required time to install; that neither the owner nor anyone in a position of authority with Pave-Co either knew of this change or approved it; and that the defect in sections 1, 2 and 3 , for which Plaintiff is billing Defendant herein, were simply too defective to constitute performance on Structure's part. Accordingly, the Court finds that Plaintiff failed to sustain its burden of demonstrating entitlement, by a fair preponderance of the credible evidence, to the monies sought on its contract claim.

As with the Plaintiff, the Defendant/Counter-claimants have the burden of proving their counterclaim by a fair preponderance of the credible evidence. Defendant's E sets forth invoices from Pave-Co to Powell Paving and Masonry for removing and resetting pavers after installation in a setting bed of fine sand for sections 2 and a portion of section 3 of the project. In addition, Mr. Dymond testified that another $29,451.40 was expended by Pave-Co for removing and reinstalling the bulk of section 1 of the project. There was clearly a serious question concerning whether the replacement work was actually done.

At the stipulation of counsel for both parties, an independent consulting firm, Lovett, Silverman, by Abi Michael J Aoun, observed the site to determine whether the pavers had, in fact , been replaced as testified to by the Defendant. By report dated December 8 , 2009, he answered in a "Field Report" (Plaintiff's 11) by stating that in two out of nine locations, sand had been installed between the bottom of the brick paver and the top of the concrete base. In seven other locations, no replacement work was found. Based on the findings in the independent report, the Court believes the Defendant/Counter-claimant has demonstrated that it was required to replace a portion of the Plaintiff's work; that portion bearing the same ratio as the findings of the independent expert. Accordingly, the Court finds that the Counter-claimant is entitled to 2/9 of its counterclaim or $17,895.33 (2/9 x $80,529.00). This claim accrued on the date of the final invoice, December 6, 2006.

Thus, based on the above, the Plaintiff's claim is dismissed and the Defendant's Counterclaim is granted to the extent of $17,895.33. This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Submit Judgment in accordance with the Court's Decision.

Dated: January 13, 2010
Riverhead, New York

EMILY PINES
J. S. C.