

**Five Town Landscaping & Gen. Contr., Inc. v
Electchester Second Hous. Co., Inc.**

2010 NY Slip Op 30620(U)

March 16, 2010

Supreme Court, Nassau County

Docket Number: 019898-07

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**FIVE TOWN LANDSCAPING AND GENERAL
CONTRACTING INC.,**

Plaintiff,

-against-

ELECTCHESTER SECOND HOUSING CO., INC.
a/k/a SECOND HOUSING CO., INC.,

Defendant.

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 019898-07
Motion Seq. Nos: 5 & 6
Submission Date: 2/4/10**

-----X

The following papers have been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibits (Proposed Amended Complaint and Revised Proposed Amended Complaint)...X**
- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affidavit in Support of R. Marin dated 1/12/10 and Exhibits.....X**
- Affidavit of A. Ippolito and Exhibits.....X**
- Letter dated 1/22/10 with substituted Exhibit "M".....X**
- Affirmation in Opposition, Affidavit of F. Magri and Exhibits.....X**
- Affidavit of R. Marin dated 1/25/10.....X**
- Affirmation in Opposition and Exhibit.....X**
- Reply Affirmation and Exhibits.....X**
- Reply Affidavit and Exhibits.....X**
- Reply Affirmation and Exhibit.....X**
- Letter dated 2/4/10.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff on January 15, 2010 and 2) the motion filed by Defendant on January 19, 2010, both of which were submitted on February 4, 2010. For the reasons set forth below, the Court 1) grants Plaintiff's

motion to amend the Complaint and directs Plaintiff to file and serve its Revised Proposed Amended Complaint within five (5) days of the date of this Order, and directs Defendant to serve its responsive pleading within twenty (20) days of service of the Revised Proposed Amended Complaint on Defendant; 2) denies Plaintiff's motion for summary judgment; and 3) denies Defendant's motion for summary judgment.

BACKGROUND

A. Relief Sought

Plaintiff Five Town Landscaping and General Contracting Inc. ("Five Town" or "Plaintiff") moves for an Order 1) pursuant to CPLR § 3212, granting Plaintiff summary judgment on the single cause of action in the complaint ("Complaint") and directing an inquest on the issue of damages; and 3) pursuant to CPLR § 3025(b), granting Plaintiff leave to amend the *ad damnun* clause in the Complaint to request higher money damages. Defendant Electchester Second Housing Co., Inc. a/k/a Second Housing Co., Inc. ("Second Housing" or "Defendant") opposes Plaintiff's motion.

Second Housing moves for an Order, pursuant to CPLR § 3212, granting summary judgment to the Defendant and dismissing the Complaint in its entirety. Plaintiff opposes Defendant's motion.

B. The Parties' History

The Complaint (Ex. C to D's motion) alleges as follows:

Five Town is a corporation with its principal place of business in Valley Stream, New York. Second Housing is a Limited Dividend Housing Company with its principal place of business in Flushing, New York.

On or about April 1, 2004, Five Town and Second Housing entered into a written agreement ("Agreement") pursuant to which Five Town was to provide landscaping and related services to Second Housing through November of 2008. The Agreement contained an agreed-upon fee schedule. From April of 2004 through June of 2007, Five Town provided landscaping and related services to Second Housing as contemplated by the Agreement. On or about June 1, 2007, Second Housing wrongfully terminated the Agreement without cause and has refused to pay Five Town for the services it provided. Plaintiff seeks compensatory damages in the sum of

\$90,000, with interest from June 1, 2007, as well as costs and disbursements.

In its Verified Answer (“Answer”), Defendant denied the material allegations in the Complaint and interposed fifteen (15) Affirmative Defenses:

First: If Plaintiff sustained damages, those damages were caused by parties over whom Defendant had no control,

Second through Fourth: Plaintiff’s claims are barred by the doctrines of waiver, estoppel and laches,

Fifth: Plaintiff failed to mitigate its damages,

Sixth: Plaintiff’s claims are barred by the Statute of Frauds,

Seventh: Plaintiff repudiated and/or anticipatorily breached the Agreement, thereby excusing Defendant’s further performance,

Eighth - In light of Plaintiff’s contractual breaches and misrepresentations, Defendant is entitled to rescission of the Agreement and its further performance is excused,

Ninth - At the time the Agreement was executed, the parties were under a mutual mistake that renders the Agreement void or voidable and warrants its rescission,

Tenth - Plaintiff’s claims are barred because they would result in Plaintiff’s unjust enrichment,

Eleventh - Plaintiff failed to fulfill conditions precedent to the Agreement, including performance of work before receiving payment, excusing Defendant’s further performance,

Twelfth - By its breaches and misrepresentations, Plaintiff effectively cancelled or repudiated the Agreement, excusing Defendant’s further performance,

Thirteenth - The Agreement is void and unenforceable because it was not approved by the New York State Division of Housing and Community Renewal [“Division of Housing”],

Fourteenth - The Agreement is too vague and indefinite to constitute a binding contract, and

Fifteenth - Plaintiff failed to name a necessary party, the Division of Housing.

Plaintiff submits an Affidavit in Support of Raul Marin (“Marin”) dated January 12, 2010

in which he affirms as follows:

Marin is the President of Five Town, a landscaping services company that he has owned since 1990. Five Town always performed services for clients pursuant to a written contract. In late 2003 or early 2004, Five Town and Second House entered into the Agreement (Ex. C to Marin Aff.). The Agreement sets forth the work to be performed (“Work”) and payment terms for 2004 and provides for similar work to be performed through 2008.

Five Town purchased costly and substantial equipment (“Equipment”) to be used in performing the Work. Marin submits that Second House was aware that Five Town incurred these expenses. From April of 2004 through June of 2007, Five Town performed the Work.

On or about June 1, 2007, Second House terminated the Contract, allegedly without cause, pursuant to a termination letter dated May 29, 2007 (“Termination Letter”) (Ex. D to Marin Aff.). In the Termination Letter, Second Housing advised Five Town that 1) on May 1, 2007 Second Housing’s Board of Directors (“Board”) voted to retain a different landscaping company; 2) as of June 1, 2007 (“Termination Date”), Second Housing no longer required Five Town’s services; and 3) Invoice number 3473 in the amount of \$1,343.77 was the last outstanding invoice that Second Housing was required to pay.

Marin affirms that, during discovery, Five Town obtained minutes (“Minutes”) from Second Housing’s Board (Ex. F to Marin Aff.). The Minutes reflect 1) discussions by board members regarding the cost of Five Town’s services as compared to those of competing services, including the statement that Five Town increased its prices and did not provide acceptable service or workmanship, 2) a successful motion by a Board member to discontinue its use of Five Town, and 3) a successful motion by a Board member to hire a different landscaping company. Marin submits that the Minutes contradict the Termination Letter.

Marin further avers that, during discovery, Second Housing subsequently produced an unsigned letter dated February 1, 2007 (“Second Letter”) from the Garden Committee (“Committee”) of Building 6 to the Board (Ex. G to Marin Aff.) expressing the Committee’s dissatisfaction with the quality of Five Town’s Work. Marin expresses skepticism regarding the timing of the Second Letter and provides a transcript from the deposition of Frank Magri

(“Magri”) (Ex. H to Marin Aff.), President of Second House, reflecting that Magri could not state definitively that the Committee, in fact, authored the Second Letter.

The Agreement provides as follows (“Dispute Provision”):

In the event of any dispute concerning the work having been done in a workmanlike manner, the parties agree that each of them shall agree upon a third party who shall examine the work and reach a decision to which both parties agree to abide by.

Marin submits that Second Housing failed to comply with the Dispute Provision and, therefore, its Termination of Five Town constituted a breach of the Agreement. Magri testified at his deposition that he was not fully aware of the Dispute Provision prior to the Termination, and that Second Housing never appointed a third party as contemplated by the Dispute Provision (Tr. at pp. 26-28). Finally, Marin affirms that Second House has provided no payment to Five Town pursuant to the Agreement since June 1, 2007.

Second Housing affirms that the only relevant documents that Five Towns produced that are relevant to its claim for lost profits are the Agreement and Five Town’s tax returns (“Returns”), and further affirms that Five Towns has not provided all the requested Returns. Second Housing provides copies of Returns for the years 2003-2007 and a draft Return for 2008 (Exs. H - M to D’s Aff. in Support) which reflect that Five Towns reported a loss for those years.

Second Housing also provides deposition testimony of Marin on March 20, 2009 (Ex. B to D’s Aff. in Support) in which he testified that Five Town received full payments from Second Housing for the Work performed in 2007 (Tr. at p. 50). Second Housing submits that, in light of the Returns and deposition testimony reflecting Marin’s lack of knowledge of Five Town’s profits, Five Town cannot demonstrate lost profits. Moreover, in light of Second Housing’s payment to Five Town for its Work up to the date of Termination, Five Town’s claim for damages relates only to the unpaid portion of the Agreement for the balance of 2007, and for 2008.

Plaintiff provides an Affidavit of Anthony Ippolito (“Ippolito”), an experienced Certified Public Accountant who serves as the accountant for Five Town, dated January 20, 2010 which addresses Five Town’s damages resulting from the Termination. Ippolito explains the methodology he used in calculating damages, and affirms that it is a methodology commonly

used in the accounting trade with respect to businesses the size of Five Town. Ippolito provides a summary (“Summary”) in which he concludes that Five Town’s lost profits total \$134,141, not including the cost of the Equipment. Ippolito also submits that the Returns, which reflect that Five Town reported losses, are not dispositive of this issue and contends that Second Housing has demonstrated a “lack of understanding of corporate finances” in arguing that the Returns establish that Five Town did not suffer lost profits (Aff. of Ippolito at ¶ 4(a)). Ippolito avers that he provided the Summary to Second Housing prior to his deposition. Ippolito affirms that Plaintiff’s damages, as outlined in the Summary, “have been calculated to a reasonable degree of certainty consistent with the realities of the situation and with an awareness that a future profit is always a variable to some degree” (Aff. of Ippolito at ¶ 5).

Five Towns has provided a copy of the Revised Proposed Amended Complaint that it will file if the Court grants its application to amend the *ad damnum* clause to request compensatory damages in the sum of \$180,000, plus interest since the Termination, which includes a request for lost profits.

Second Housing provides an Affidavit of Magri dated January 26, 2010 in which he affirms as follows:

Magri is the current President of Second Housing and has been a member of the Board since approximately 1992. Magri disputes Marin’s affirmation that Five Town provided appropriate services pursuant to the Agreement and affirms that there were numerous inadequacies in the Work, including 1) Five Town did not perform the Spring cleanup properly, as demonstrated by their failure to remove all dead leaves and branches; and 2) Five Town applied lime and fertilizer carelessly, and did not apply those items frequently enough, resulting in brown patches and dirt areas where grass should have grown. Magri suggests that Five Town’s decline in performance may have been attributable, in part, to the participation of Marin’s son who did not pay sufficient attention to detail.

Magri also avers that, in the last couple of years of the Agreement, Five Town began to charge Second Housing thousands of dollars in “extras” such as seeding and shearing hedges (Magri Aff. at ¶ 9) that were supposed to be included in the price of the Agreement. Five Town also began to perform work, such as pruning and installing shrubs, that Second Housing had not

requested and did not authorize. In addition, Second Housing received numerous complaints from its residents regarding the careless performance of Five Town, including an instance when it trimmed a large tree in a manner that resulted in a large limb falling and destroying another tree.

Magri affirms that Second Housing has compensated Five Town in full for all services performed up to the Termination. Magri also denies knowledge that Five Town incurred expenses in purchasing the Equipment, affirming that Five Town never requested that Second Housing pay for that Equipment and that the parties never discussed the Equipment.

In his Reply Affidavit dated February 3, 2010, Marin submits, *inter alia*, that 1) Magri has failed to provide documentation in support of his allegations regarding Five Town's improper billing, and the documentation before the Court does not support this allegation; 2) at the March 20, 2009 deposition of Juan Martinez ("Martinez"), a foreman at Second Housing (Ex. B to Marin Reply Aff.), Martinez never mentioned improper billing when responding to questions regarding the reason for the Termination; and 3) the allegations made by Magri should have been addressed in the manner prescribed by the Dispute Provision.

C. The Parties' Positions

Plaintiff submits that 1) it has demonstrated that Defendant breached the Agreement and, therefore, is entitled to summary judgment; and 2) in light of new information that Plaintiff has learned, and the absence of prejudice to Defendant, the Court should grant Plaintiff leave to amend the *ad damnum* clause in its complaint to request damages in the sum of \$180,000 by permitting Plaintiff to file its Revised Proposed Amended Complaint, annexed as Exhibit A to Plaintiff's Notice of Motion dated January 21, 2010.

Defendant submits that 1) the Court should deny Plaintiff's motion to amend because Plaintiff is unable to establish the additional damages, consisting of lost profits; and 2) in light of Defendant's payment to Plaintiff for its services up to the Termination date and Plaintiff's alleged inability to establish lost profits, Defendant is entitled to summary judgment dismissing the Complaint.

RULING OF THE COURT

A. Summary Judgment Principles

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

C. Amendment of Pleadings

CPLR § 3025(b) provides as follows:

A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

Leave to amend should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise, and is not patently devoid of merit. *Uadi, Inc. v. Stern*, 67 A.D.3d 899 (2d Dept. 2009).

D. Application of these Principles to the Instant Action

In light of the relevant statutory authority and applicable case law, the Court is constrained to grant Plaintiff's application to amend its Complaint. This case is, however, nearly on the eve of trial, as trial is scheduled to commence on April 12, 2010. Accordingly, the Court directs Plaintiff to file and serve its Revised Proposed Amended Complaint within five (5) days of the date of this Order, and directs Defendant to serve its responsive pleading within twenty

(20) days of service of the Revised Proposed Amended Complaint.

The Court also concludes that summary judgment is not appropriate in this case, in light of the factual disputes regarding, *inter alia*, 1) whether Defendant appropriately terminated the Agreement; and 2) whether Defendant's failure to comply with the Dispute Provision constituted a material breach of the Agreement. Accordingly, the Court denies the motions by Plaintiff and Defendant for summary judgment.

All matters not decided herein are hereby denied.

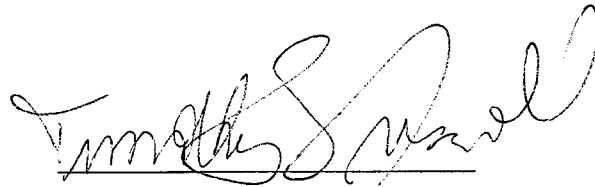
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a pre-trial conference on April 7, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

March 16, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAR 19 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**