

**Superior Interior, Inc. v International Blind Contrs.,
Ltd.**

2010 NY Slip Op 31143(U)

April 2, 2010

Supreme Court, Suffolk County

Docket Number: 04-3044

Judge: Kevin J. Crowley

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SUFFOLK COUNTY COURT
HAUPPAUGE, NEW YORK

SUPERIOR INTERIOR, INC.,

Hon. Kevin J. Crowley

Plaintiff,

Index No. 04-3044

- against -

INTERNATIONAL BLIND CONTRACTORS, LTD.,
AND PAVARINI MCGOVERN,

Defendants.

MEMORANDUM DECISION

In this action for breach of contract, plaintiff Superior Interior, Inc. ("Superior") alleged that defendant, International Blind Contractors Ltd. ("International") breached an oral subcontract which they had entered into on or about January 10, 2003 by ordering Superior to stop work on installation of mechanized shades in offices of the Bank of America on February 24, 2003 by and failing to pay the balance remaining of \$24,000.00 on the original \$50,000.00 agreement.

A second cause of action for payment to cover additional work not under the original agreement was resolved by partial payment and the granting of summary judgment on pretrial motion before remand to this Court from the Supreme Court under CPLR §325(d). A third cause of action is for reimbursement of overtime or "premium time" for labor costs which plaintiff maintains International had agreed would not be included in the original \$50,000.00 price, but would nevertheless be reimbursed by International when necessarily incurred by Superior.

A counterclaim for breach of contract by defendant International against Superior to the extent it was based upon untimely performance was also dismissed in the Supreme Court, but apparently survived here for trial to the extent it was based upon a claim of defective work by Superior.

Pavarini McGovern LLC ("Pavarini") is named as a defendant on the theory that although they had contracted for International to do this shade installation work together with additional work (see Exhibit 19), they were aware of Superior's subcontract with International and accepted and benefitted from plaintiff's performance, thereby becoming liable for the unpaid balance.

The case, went to trial before the undersigned over a period of eight trial days totaling more than 22 hours and written submissions were received from both counsel.

Three witnesses William Boyle, owner and President of Superior; Ricky Janowitz, Vice President of International and Feyzullah Incekara, a union carpenter employed by International testified. A deposition of Taiye Adewumi, project manager for Pavarini was offered by plaintiff and this Court has determined that it should be received and considered as evidence under CPLR §3117sub(a2) and (a3ii).

The Court finds that the witnesses, William Boyle and Ricky Janowitz were generally credible except that they did not always accurately recall and relate the substance of the oral agreement they reached on January 10, 2003, which agreement was never subscribed in writing and signed by each of them, although limited notes were kept on some terms of the agreement by Mr. Boyle (Exhibit 1). Their testimony also did not accurately reflect the number of shades actually installed by Superior before the contract was terminated by International on February 24, 2003. Mr. Incekara, on the other hand, had a generally accurate recollection of the amount of work he performed with two other carpenters to finish the last eight shades after that date and his testimony is generally corroborated by the records of hours worked previously offered as evidence on behalf of plaintiff as discussed below.

FINDINGS OF FACT

Based upon the above testimony as well as the numerous exhibits offered and received into evidence, this Court makes the following findings of fact:

On or about December 4, 2002, Pavarini and International reached a tentative agreement for International to install 32 mechanized "Mecho-Shades" on the recently renovated "trading floor" of the Bank of America. The written agreement (Exhibit 19) was dated December 4, 2002 (page 1) but was signed by Ricky Janowitz for International on December 20, 2002 (page 12) and approved by initials from various departments of Pavarini on different dates up to January 13, 2003 (see stamp on cover sheet, Exhibit 19). It was finally signed by Eric McGovern, the President of Pavarini on January 15, 2003 (page 12).

Perhaps because of this delay, only a very small portion of the shades had been ordered from Mecho-Shade, the manufacturer, before January 7, 2003 (see first 5 invoices Exhibit 21 and summary of invoices Exhibit 20). By January 10, 2003, only six of the thirty-two shades had been installed by International.

The contract between Pavarini and International contained a "time is of the essence" clause (Exhibit 19, Article 6, page 5) but without a deadline for completion or a work schedule such clause is meaningless since by examining the contract, no one could answer the question "What time is of the essence?". Although "Exhibit G Project Schedule" is listed on the index of the contract (Exhibit 19, page 5) as an attachment, no such attachment was offered to this court. Although testimony was offered that such a schedule existed, and a "schedule" was referred to in correspondence sent from Pavarini to International (Exhibits E and F) no witness ever claimed to know what the contract deadline for completion of the shade installation actually was.

In any event, by the first week of January when his carpenters had installed only six of the thirty two shades Ricky Janowitz of International had determined that he did not have sufficient union carpenters on his payroll to complete this work as well as other contracts requiring the same personnel. In addition, he had been informed by letter from Pavarini in early December that since the Bank of America personnel were now occupying their trading floor during the day; all shade installation work must be done in the evening hours after December 8, 2002 (Exhibit A) therefore, Janowitz began to look for a subcontractor to do the installation work. A call to Mecho-Shade, manufacturer of the shades, elicited the name and telephone number of William Boyle and his company, plaintiff Superior (Exhibit B).

William Boyle and Ricky Janowitz met on January 10, 2003 to discuss the subcontract agreement. They agreed on a total price of \$50,000.00 to cover the installation of 26 shades. The Court finds that they discussed the likelihood that some overtime or "premium time" would need to be paid because both of them, having employed union carpenters, knew that union contracts often require payments of time and one half for unusual work schedules. The Court finds that they agreed that the \$50,000.00 would not include any additional cost of overtime but that Superior would be reimbursed by International for any added costs required by

any union labor contracts. The Court does not believe that the oral understanding gave to either Mr. Boyle or Mr. Janowitz the discretion to decide if "premium time" should be paid but rather that the union contract should control. They did not agree to set any specific deadline for the installation of the 26 shades nor agree on any work schedule for the installation of a certain number of shades or man hours of work per week nor minimum work days per week. They only agreed that the job should be completed "as soon as possible" without attempting to define what "possible" meant under these circumstances to either Superior or International.

The best evidence received by the Court concerning the requirements of the union contract was Exhibit 14 which includes specific requirements when time and one-half wage rates need to be paid. Article X, section 1 provides for time and one-half overtime beyond the normal seven or eight hour work day. Section 3 allows a second shift only when a first shift is scheduled, with the last hour of the second shift at double time. Section 4, entitled "Off-H our Work on Alteration and Repair Work "covers"... alteration ... in an occupied building, and when it is not possible to perform said work during regular working hours...". Rate of pay shall be at the second shift rate of pay with excess hours above the shift at time and one-half.

The oral agreement between William Boyle for Superior and Ricky Janowitz for International called for Superior to commence work on January 17th and this did occur (Exhibit 8, Invoice 304) when three of plaintiff's carpenters worked a seven hour shift on January 17 and a 12 hour shift on January 18 for a total of 57 man hours during the first week. During the next five weeks plaintiff's carpenters worked 74 man hours for the period of commencing January 21 (Exhibit 15, Invoice 305), 126 man hours for the period commencing January 28, (Exhibit 9, Invoice 310), 126 man hours for the period commencing February 3 (Exhibit 16, Invoice 311), 70 man hours for the period commencing February 10 (Exhibit 6, Invoice 307) and 87 man hours for the period commencing February 18 (Exhibit 7, Invoice 308). Over this period of five weeks and two days, a total of 540 man hours work were performed by plaintiff's employees.

How many shades were actually installed by plaintiff's employees in this same period is more difficult to determine. Both Mr. Boyle and Mr. Janowitz apparently did not keep written record; and their testimony varied widely from 13 fully completed shades to 25 by the time plaintiff was "fired" and told to leave the job by Mr. Janowitz for International on February 24. The Court finds that Mr. Incekara's testimony is the most reliable on this issue since he and his crew finished the job and therefore,

based on his statement that he completed the last light shade over twelve working days with a 3 man crew by March 9, the Court finds that when plaintiff left the job on February 24 at Mr. Janowitz direction, plaintiff had completed the equivalent of eighteen of the twenty six shades covered by the original agreement (about ____%).

The Court also finds from the testimony of Mr. Incekara and Mr. Boyle that approximately 30 man hours (slightly less than one and one half seven hour days for a three man crew) were required to complete installation of one shade. Since Mr. Janowitz and Mr. Boyle were experienced with this type of work, it could be expected that they would be familiar with the approximate number of 780 man hours to install 26 shades and the fact that an average 3 man crew working a 5 day, 35 hour week would take about seven and one-half weeks to complete the installation work covered by their-agreement.

However, on January 31, only two weeks after Superior had started work under its oral agreement with International, Pavarini become dissatisfied with the pace of shade installation under its contract with International (Exhibit 19). Through its Project Executive Jim Allen, Pavarini sent a letter to International accusing it of "...fail(ing) to meet the schedule for installation of window treatments...", directing it to provide a "second shift of installers" and threatening to declare it is breach of contract (Exhibit E). Nine days later on February 9 (see Exhibit F, dated December 4 but reading "Last night, February 10, 2003") Pavarini sent a second letter, declaring International in default and accusing it of "fail(ing) to meet its contract schedule..." and "...all subsequent recovery schedules..." and giving it 72 hours o cure the default or face termination. Four days later on February 13 a third letter was sent stating that Pavarini had failed to cure within 72 hours and remained in default. (Exhibit G).

The Court would note however that when the first of these letters was sent on January 31, Superior's carpenters had already performed 257 man hours works on the job (almost one-third of the 780 total estimated by this Court to be needed) although under the oral agreement between Mr. Boyle and Mr. Janowitz, they had only been on the job for 14 days since January 17.

International, clearly reading to the above pressure from Pavarini, tried to get Superior to work faster and apparently did have trouble reach Mr. Boyle when his workers were on the job without supervision on February 16 (Exhibits H & I). Mr. Boyle, in turn, blamed short periods of delay on lack of materials, lack of floor protection (which Pavarini had indicated would be

provided) and delayed payment by International after he billed them for work completed.

The "lack of materials" argument may be corroborated then the Mecho-Shade invoices contained and summarized in Exhibits 21 and 20. They show that of the more than 99,000 worth of materials ordered under an International account for the "BOA" or Bank of America job, more than \$24,000.00 were not invoiced or shipped until February 20 or later. By that date, International had already decided to fire Superior for breach of the oral agreement on February 24. Of course, other work was being performed by International under its contract with Pavarini and it was never proven whether any of that work involved materials from Mecho-Shade.

The "floor damage" argument was also corroborated by testimony that International was ultimately restored to good standing and paid under its contract with Pavarini, and received payment, but \$10,000.00 was withheld from the final payment to cover damage to the floor.

Mr. Boyle testified that at one point he stopped work for several days because he believed that International was slow in payment for invoices billed. When payment occurred he resumed work.

This Court also finds that the last 8 shades were installed by Mr. Incekara with a crew totaling three union carpenters over a period of twelve work days (apparently seven hour shifts) ending March 9. Completion of the job after Superior was fired therefore involved approximately 252 man hours.

CONCLUSION OF LAW

The first issue to be resolved is which of the parties Superior or International had breached the oral agreement as of February 24, the day that Mr. Janowitz ordered Mr. Boyle to remove his crew from the job site.

To the extent that International's claim of Superior's breach is based on "defective work" the Court finds no specific evidence in the record of any defects in the work performed by Superior. Even Mr. Incekara who was directed by International to finish the job, testified to no defects in Superior's work that had to be cured nor was any other evidence presented of repair work by others.

The claim of breach of contract based on delays in Superior

performance by Superior is more complex. First, it should be observed that the language both Mr Janowitz and Mr. Boyle used in their oral agreement, i.e. "as soon as possible" is not the equivalent of "time is of the essence", particularly because no completion date or work schedule was discussed. Each of the parties to this agreement could place their own interpretation on what was "possible" based on their own expectation and their own needs which were obviously very different. If Mr. Janowitz had wanted the job completed by a specific date he could have included that in the agreement, preferably in written form. The "as soon as possible" standard bears little difference from the "reasonable time" standard that the Court would imply in the absence of any specific completion date. The Court would also note that no requirement of specific days to be worked or hours invested per week was included in this oral agreement.

On the day that International terminated the contract, February 24, Superior had completed 18 of the 26 shades and invested 540 of the required approximate 780 man hours on this job (approximately 69%). A reasonable estimate for the time to complete the entire job from the beginning would be 7 weeks and 2 days (based upon a 3 man crew working a 35 hour week, 105 hours per week). Superior had therefore used about 73% of the estimated time to complete 69% of the work. At most they were one or two days behind schedule and at their present rate would have completed the job within 2 to 3 weeks. The Court does not find this to be a breach of contract. Superior was "on tract to complete the job within a reasonable time under the circumstances prevailing on the job site including the unforeseen brief delays discussed above.

It is true that during several of the weeks in question, Superior's work crew worked less than 105 man hours, the time that would be expected from a three man crew working a 35 hour week, but it is also true that during two weeks, reflected in Invoice 310 (Exhibit 9) and Invoice 311 (Exhibit 16) 126 man hours were worked each week, using 5 man crews on some days, thereby maintaining A "reasonable" pace to completion.

Based upon the above, this Court finds that as of the firing date February 22, Superior had not breached its contract with International, but that International, by ordering Superior off the job with sufficient cause, thereby denying it the opportunity to earn the remaining profit on its contract breach the agreement and became liable for damages to Superior.

Damages on the original base contract should be computed by subtracting the cast of performance of the remaining services from the payments remaining on the original agreed amount of \$50,000.00. At trial, both sides agreed that the remaining

balance was \$24,000.00. This Court finds that 240 man hours would have been required to complete the job. From the fact that premium time was paid at an additional \$22.50 per hour (an uncontroverted assertion by William Boyle also reflected in all invoices submitted for time and one half pay), the Court finds that the regular rate of \$45.00 should be applied. No overtime is involved in computing costs to perform because if overtime was required it would be reimbursed in full, profit as discussed below resulting in no additional profit. Costs to perform would be \$10,800.00 resulting in lost profits of \$13,200.00 on the base contract.

The third cause of action; the only other claim which could result damage4s is resolved as follows:

As discussed above this Court finds that the union contract provisions, not the discretion, judgment or past practice of either party would control on the issue of when and how much International would reimburse Superior for "premium time" or overtime. The only direct evidence offered concerning the provisions of that contract was Article 10 of Exhibit 14. Having examined all section of that Article, this Court finds that Section 4 "Off Hour Work on Alteration and Repair Work" is most directly applicable since it deals with "...alternations... in an occupied building and when it is not possible to perform said work during regular working hours...". The overtime provisions of Section 1 do not apply because Section 1 by its terms only requires overtime when the original shift of seven or eight hours has been paid at the regular rate which did not occur here.

Section 4 requires that "the work day and rate of pay shall be the same as the second shift provisions". Section 3 dealing with shift work requires "...one hour at double time rate of pay for the last hour of the shift (eight for even, nine for eight)." Section 4 also requires that "all additional hours worked in excess of the shift hours shall be paid at the time and one half rate".

Examining the four unpaid vouchers submitted for overtime Invoice 310 (Exhibit 9)-Invoice 311-(Exhibit 16), Invoice 307-(Exhibit 6) and Invoice 308-(Exhibit 7), the Court finds that all shifts worked were seven hours and therefore "double time", that is, one hour of regular pay above that normally paid, should have been paid for the last hour of each shift totaling 56 hours extra pay (under Section 4) at the full rate of pay. No hours beyond seven were worked on any shift requiring no further payment beyond this. Payment for these additional 56 hours at the full rate of \$45.00 would total \$2,520.00 additional damages.

The Court finds that payment by International of the higher

amounts calculated under the first two invoices submitted 304 and 305 (Exhibits 8 and 15) was an acceptance of Superior's claim on these amounts in order to avoid further disputes and resulted in no further liability to either side on these two vouchers.

The counterclaim by International must be dismissed because it was International not Superior which breached the agreement as discussed above. Superior's second cause of action was previously dismissed and rendered moot by payment as discussed above. The claim against Pavarini was not supported by any proof that Pavarini was a party to the contract or even aware of its terms and therefore, this claim must be dismissed.

Judgment should be entered in favor of plaintiff Superior for \$13,200.00 on the first cause of action and \$2,520.00 on the third cause of action. All other claims should be dismissed.

Submit judgment in accordance with the above.

Dated: 4.2-10

[Handwritten Signature]
J.C.C.