

P.C. Richard & Son L.I. Corp. v Falcon Pac. Constr., LLC
2010 NY Slip Op 31359(U)
May 18, 2010
Sup Ct, NY County
Docket Number: 401277/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PART 10

PRESENT:

J.S.C.

Index Number : 401277/2009

P.C. RICHARD & SON LONG ISLAND

vs

FALCON PACIFIC CONSTRUCTION

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
JUN 01 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAY 18 2010

HON. JUDITH J. GISCHE ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
P.C. RICHARD & SON LONG ISLAND
CORPORATION,

Plaintiff,

-against-

FALCON PACIFIC CONSTRUCTION, LLC,

Defendant.
-----X

DECISION/ ORDER

Index No.: 401277/09

Seq. No.: 002

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
Pltf's n/m (CPLR § 3212) w/YP affirm, PD and RT affids, exhs	1
Def's opp w/DHM affirm, KMS affid, exhs	2
Pltf's reply w/YP affirm, PD affid	3

FILED
JUN 01 2010
NEW YORK
COUNTY CLERKS OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of contract, account stated, and related causes of action. Plaintiff, P.C. Richard & Son Long Island Corporation ("PC Richard"), seeks to recover monies due on a purchase order agreement, entered into between plaintiff and defendant. Plaintiff moves, pursuant to CPLR § 3212, for summary judgment in its favor against defendant, Falcon Pacific Construction, LLC ("Falcon"). Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. (CPLR § 3212[a], Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept. 2001]).

It is undisputed that PC Richard, as seller, and Falcon, as buyer, entered into a Purchase Order Agreement dated January 19, 2007 (the "Agreement"). Under the

Agreement, PC Richard agreed to provide various supplies and services to Falcon, in the total amount of \$1,655,277.00. The Agreement, prepared on Falcon's letterhead, directs that all invoices be sent to Falcon. Falcon is identified and defined as "Buyer" and the Agreement is signed by a representative of Falcon.

The Agreement provides, in pertinent part, as follows:

11. Payment - For purchases made hereunder: Seller shall submit invoices timely to Buyer upon delivery of all items. Buyer shall pay the balance of such invoices within thirty (30) days of receipt and acceptance of all goods.

PC Richard moves for summary judgment against Falcon on the grounds that there are no disputed triable issues of fact. PC Richard has provided the affidavits of Rick Torre a general manager/director and Paola Dibono, a finance/credit manager, which factually establish that Falcon, the buyer, failed to pay \$323,326.97 for the goods, wares, and merchandise delivered to Falcon. PC Richard claims it sent bills to Falcon that Falcon retained and did not object to and that Falcon did not reject any of the goods PC Richard delivered to it. Copies of the actual bills and invoices detailing the merchandise purchased and the amounts charged are provided on this motion.

In opposition to PC Richard's motion, Falcon argues that when it entered into the Agreement with PC Richard, it was acting as an agent for a disclosed principal, which is 25 Broad, LLC, the owner of the property and developer. Falcon argues that it is not liable to pay any money owed to PC Richard because those payments are the responsibility of 25 Broad, LLC. Falcon contends that it disclosed this agency relationship with the developer and "repeatedly reinforced the agency relationship" throughout its dealings with PC Richard. Additionally, according to Falcon, PC Richard's

complaint fails to set forth the items in its verified complaint with particularity, under CPLR § 3016(f). Finally, Falcon contends that it was billed and submitted payments for \$343,933.08 of which only \$85,537.00 remains unpaid.

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). In connection with a cause of action for breach of contract, only where the intent of the parties can be determined from the face of the agreement, will interpretation be a matter of law and the case ripe for summary judgment. American Express Bank v. Uniroyal, 164 A.D.2d 275 *app den.* 77 N.Y.2d 807 (1991). The court must give weight to what is in the contract, not in the parties' minds. WWW Associates Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2d Dept. 1990).

PC Richard has established its *prima facie* case, that there is a Purchase Order Agreement between itself and Falcon for the amount of \$1,655,227.00. PC Richard has also proved that pursuant to the conditions of the Agreement, Falcon is required to "pay

the balance of such invoices” provided to it by PC Richard “within thirty (30) days of receipt and acceptance of all goods.” It has proved it provided the merchandise and billed Falcon for same but that Falcon did not pay for the merchandise. Falcon’s opposition does not raise any triable issues of fact or set forth any legal arguments that defeat PC Richard’s motion for summary judgment or warrant its denial for the reasons that follow:

Although Falcon may have been an agent for 25 Broad, LLC pursuant to a Construction Management Agreement (“Construction Agreement”) between Falcon, as construction manager, and 25 Broad LLC, as owner, PC Richard is not a party to or a third-party beneficiary of the Agreement. PC Richard, therefore, is not bound by the terms of the Construction Agreement or constrained to seek any relief against 25 Broad, LLC as Falcon urges. State of California Public Employees’ Retirement System v. Sherman & Sterling, 95 N.Y.2d 427, 435 (1st Dept. 2000); Edge Management Consulting, Inc. v. Blank, 25 A.D.3d 364 (1st Dept. 2006).

Conversely, the Agreement between PC Richard and Falcon does not list 25 Broad, LLC as a party to the Agreement, nor is it mentioned or referred to anywhere within the Agreement. Falcon signed the Agreement in its own capacity and not in any agency capacity. The Agreement is typed on Falcon letterhead, lists Falcon as “Buyer,” designates Falcon as the invoice mailing address, and is signed by a Falcon representative. While, Falcon argues that it disclosed its agency relationship to PC Richard and “repeatedly reinforced the agency relationship” throughout its dealings with PC Richard, the four corners of the Agreement contain no such reservation of rights.

Falcon’s attempts to show that it was an agent by showing that it made payments

to PC Richard with checks that include the term "A/A/F 25 Broad, LLC," are unhelpful and do not establish a viable defense that would defeat plaintiff's motion. Even if the checks contained that memo, such notation would not change the material terms of the Purchase Order Agreement between the parties.

Furthermore, Falcon and PC Richard entered into a Credit Purchase Agreement (the "Credit Agreement"), in which Falcon received a line of credit for \$250,000.00. The Credit Agreement lists Falcon as the business name and is signed by Sandra Pupera, Executive Vice President/Chief Financial Officer of Falcon. The Credit Agreement makes no mention of 25 Broad, LLC and it, similarly, does not state that Falcon is entering the Credit Agreement in its capacity as an agent.

Falcon's argument, that it already submitted payments for \$343,933.08 and only \$85,537.00 remains unpaid, is also unsupported by the evidence it has submitted on this motion. Falcon provides a spreadsheet, kept as part of its own records, which lists all transactions between PC Richard and Falcon. The spreadsheet shows that Falcon paid \$1,420,736.66 in bills and that \$85,537.00 remains outstanding. However, the invoice numbers, dates, and amounts do not correspond with any of the invoice numbers, dates, or amounts proven by PC Richard to be due and owing. Therefore, the spreadsheet does not support Falcon's contention that it already paid PC Richard the money it currently demands.

Falcon's argument, that PC Richard's complaint lacked the particularity specified under CPLR § 3016(f), is also unavailing. CPLR § 3016(f) states:

(f) Sale and delivery of goods or performing of labor or services. In an action involving the sale and delivery of goods, or the performing of labor or services, or the furnishing of materials, the plaintiff *may* set forth and

number in his verified complaint the items of his claim and the reasonable value or agreed price of each. Thereupon the defendant by his verified answer shall indicate specifically those items he disputes and whether in respect of delivery or performance, reasonable value or agreed price [emphasis added].

This provision of the CPLR may be used by a plaintiff who has sold goods, furnished materials, or rendered services in significant quantity. The plaintiff has the option of drawing up a detailed schedule of those goods or services, listing each one individually, along with the date of sale or rendition, the agreed value, or price of each. If a plaintiff does this, then the defendant must specifically dispute the items on the list individually and indicate exactly in what regard they are disputed. A general denial in defendant's answer will constitute an admission of the items. Duban v. Platt, 23 A.D.2d 660 (2d Dept. 1965), *aff'd* 17 N.Y.2d 526.

PC Richard's complaint provides a detailed schedule of the goods and services provided to Falcon. PC Richard's complaint includes: invoice numbers, product name, model, type, quantity, manufacturer, date, unit price, total price, customer number, salesman number, sold to address, and ship to address. Falcon does not dispute the content of these invoices, that they are unpaid or never sent. There is also no factual claim raised by Falcon that the goods were never delivered.

Accordingly, PC Richard is entitled to payment for supplies and services rendered pursuant to the Agreement. Falcon owes PC Richard a total of \$323,325.97,¹ as set forth in the following six invoices, attached to PC Richard's complaint: (1) Invoice # 023-

¹Plaintiff asks for \$323,326.97, however the Court's calculations total one dollar less, amounting to an outstanding balance of \$323,325.97.

0884099 for \$52,308.50; (2) Invoice # 023-0886471 for \$65,216.83; (3) Invoice # 023-0878479 for \$40,300.09; (4) Invoice # 023-0886125 for \$161,053.92; (5) Invoice # 023-0903102 for \$671.93; (6) Invoice # 023-0912837 for \$3,774.70.

PC Richard is entitled to a money judgment against Falcon in the principal sum of \$323,325.97 on its cause of action for breach of contract. Since each invoice was rendered on a different date, PC Richard is also entitled to interest from June 5, 2008 (as a reasonable intermediate date [CPLR § 5001(b)]).

The claim for unjust enrichment is dismissed because the parties' dispute is covered by an actual contract. Accurate Copy Service of America, Inc. v. Fisk Bldg. Associates LLC, 72 A.D.3d 456 (1st Dept. 2010); Singer Asset Finance Co., LLC v. Melvin, 33 A.D.3d 355 (1st Dept. 2006). The claim for account stated simply duplicates the relief for breach of contract and results in no greater judgment.

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Here, the Agreement expressly provides that Falcon is responsible for PC Richard's reasonable attorneys fees, costs and expenses incurred in this action. PC Richard has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The Court, therefore, refers the issue of what PC Richard may recover from Falcon for its reasonable attorneys fees, costs and disbursements to hear and report back to the Court. PC Richard is hereby directed to serve a copy of this decision and order upon the Office

of the Special Referee within 60 days so that this reference can be assigned. Failure to do so will be deemed an abandonment of this aspect of relief.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Plaintiff, P.C. Richard & Son Long Island Corporation's motion for summary judgment is granted and Plaintiff is entitled to summary judgment against Defendant, Falcon Pacific Construction, LLC; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of Plaintiff and against the Defendant in the following amount: \$323,325.97 plus interest from June 5, 2008 (as a reasonable intermediate date); and it is further


ORDERED that the issue of what Plaintiff may recover from Defendant for its reasonable attorneys fees, costs and disbursements is hereby referred to a Special Referee to hear and report back to the Court; and it is further

ORDERED that Plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee within 60 days so that the reference identified herein can be assigned; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
May 18, 2010

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED
JUN 01 2010
NEW YORK
COUNTY CLERK'S OFFICE
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