

Alpha Interiors, Inc. v Tulger Constr. Corp.

2010 NY Slip Op 31449(U)

May 21, 2010

Supreme Court, Queens County

Docket Number: 25971/2008

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

_____ x ALPHA INTERIORS, INC., <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p> TULGER CONSTRUCTION CORPORATION, <p style="text-align: center;">Defendant.</p> _____ x	Index Number <u>25971</u> 2008 Motion Date <u>March 31,</u> 2010 Motion Cal. Number <u>1</u> Motion Seq. No. <u>1</u>
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The following papers numbered 1 to 8 read on this motion by plaintiff Alpha Interiors, Inc. for, inter alia, summary judgment on its cause of action for breach of contract and on this cross motion by defendant Tulger Construction Corporation for, inter alia, summary judgment on its first counterclaim for breach of contract.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1
Notice of Cross Motion - Affidavits - Exhibits.....	2
Reply Affidavits.....	3-4
Memoranda of Law	5-8

Upon the foregoing papers it is ordered that: That branch of plaintiff Alpha’s motion which is for summary judgment on its cause of action for breach of contract is denied. That branch of plaintiff Alpha’s motion which is for summary judgment dismissing defendant Tulger’s counterclaims pursuant to CPLR 3211(a)(4) (another action pending) and CPLR 3211(a)(5) (res judicata) is granted. The cross motion by defendant Tulger for, inter

alia, summary judgment on its first counterclaim for breach of contract is denied. (See the accompanying memorandum.)

Dated: May 21, 2010

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

	X	INDEX NO. 25971/08
ALPHA INTERIORS, INC.,		MOTION SEQ. NO. 1
Plaintiff,		BY: KITZES, J.
- against -		DATED: May 21, 2010
TULGER CONSTRUCTION COMPANY,		MOTION
Defendant.		DATE: March 31, 2010
	X	MOTION CAL NO. 1

Plaintiff Alpha Interior, Inc. has moved for, inter alia, summary judgment on its cause of action for breach of contract. Defendant Tulger Construction Corporation has cross moved for, inter alia, summary judgment on its first counterclaim for breach of contract.

The Incorporated Village of Lake Success owned a facility with a golf activities center located at 318 Lakeville Road, Lake Success, New York. In or about January, 2008, the village entered into a contract with defendant Tulger Construction Corporation whereby the latter agreed to act as the general contractor on a project involving new construction at the golf activities center. On or about January 9, 2008, defendant Tulger subcontracted framing, carpentry, and drywall work to plaintiff Alpha at an original price of \$236,000, which, according to the plaintiff, increased to \$363,751.18 because of approximately 57 subsequent change orders. Plaintiff Alpha alleges that it performed all the work required by the subcontract, except work not done through no fault of its own, but defendant Tulger has failed to pay \$133,082.82 owed pursuant to the subcontract. Bruce

Corby, formerly an employee of defendant Tulger, acted as the project superintendent for his former employer, and he swears in an affidavit submitted on behalf of the plaintiff: “Alpha properly and completely finished all base contract and change order work that Tulger requested it to perform.”

Defendant Tulger alleges that the village continually requested changes to the work originally contracted for and issued numerous change orders pursuant to the Construction Change Directive (CCD) sections of the prime contract. Section 7.3.1 defined a construction change directive as “a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the work prior to agreement on adjustment, if any, in the contract sum or contract time, or both ***.” Section 7.3.2 provided: “A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.” These and related sections of the prime contract obligated Tulger to comply with change directives without agreements on the amount payable for the modifications to the work ; such agreements would be reached at the time of final settlement and payment.

The architect issued numerous change orders (using the term to include CCD’s as the parties do) to defendant Tulger, most of which involved work to be done by plaintiff Alpha. On or about February 5, 2008, Tulger sent to Alpha a standard format provided by the architect that had to be followed on all submissions for change orders. Brendan O’Hara, the defendant’s vice-president, alleges: “Alpha, however, with the exception of a few Change Orders, did not follow the format required by Lucchesi [the architect]. Alpha failed to supply payroll checks and payment forms for materials. Moreover, Alpha insisted that Tulger approve its non-conforming Change Orders or Alpha would hold up the work.” On or about June 26, 2008, after informing Alpha of problems with its change orders, Tulger returned change orders 3 through 54 to Alpha and requested proper documentation for them. Defendant Tulger alleges that plaintiff Alpha did not comply in a satisfactory manner and that, as a consequence, Tulger had to go to arbitration with the village over the payment

sought in the change orders and to eventually accept less than it should have (approximately \$125,000 on a \$200,000 claim). According to O’Hara, “Tulger was not successful in getting paid as much as it should have because of Alpha’s failure to provide proper back-up documentation for each Change Order.”

On the other hand, Alpha alleges that it “substantially complied with the paperwork requirements.” Charles Ribaud, the President of plaintiff Alpha, alleges: “Alpha *** complied with the paperwork requirements. Here, each of Alpha’s change orders and job work tickets executed by Tulger set forth the necessary elements for a change order: a description of the work, the cost of materials, the cost for the labor, the sub-total and the overhead and profit. *** It was only after Alpha complained about not being paid for any of the change order work that Tulger then started to request documents that no other general contractor or project owner had ever requested Alpha to provide on any of the thousands of projects Alpha has successfully completed.” Corby alleges “I never heard a complaint with any of the work performed by Alpha. Moreover, during my almost daily conversations with Tulger’s Vice President, Brendan O’Hara, during the Project, I never heard him voice a complaint about *** the paper information that Alpha submitted in support of its change order or extra work claims.”

Defendant Tulger asserts that plaintiff Alpha breached the subcontract by not supplying proper documentation for the change orders. Section 1.1 of the subcontract provided in relevant part: “The Contract Documents for this Subcontract consist of this Agreement *** the Agreement between the Owner and the Contractor dated as of 1/9/08, the Conditions of the Contract between the Owner and Contractor ***. These form the Subcontract ***.” Section 11.9.1 provided in relevant part: “The Subcontractor may be ordered in writing by the Contractor *** to make changes in the Work within the general scope of this Subcontract ***. The Subcontractor, prior to the commencement of such changed or revised work, shall submit promptly to the Contractor written copies of any claim for adjustment to the Contract Sum and Contract Time for such revised Work *in a manner*

consistent with the Contract Documents.” (Italics added.) Section 11.10.1 provided in relevant part: “The Subcontractor shall make all claims promptly to the Contractor for additional cost *** or other causes *in accordance with the Contract Documents.*” (Italics added.)

Defendant Tulger also asserts that plaintiff Alpha breached the subcontract by failing to pay all of its sub-subcontractors and suppliers. Paragraph 6.2. of the subcontract provided: “Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor’s Work have been satisfied.” O’Hara alleges that the plaintiff breached paragraph 6.2 by falsely representing to the defendant that it had made payments to all sub-subcontractors and suppliers. O’Hara alleges that on or about August 15, 2008, Marjam Supply Co., Inc. filed a mechanic’s lien against the village in the amount of \$45,692.25 and that on or about August 13, 2008, Able Equipment Rental, Inc. filed a mechanic’s lien in the amount of \$7,252.36 because of defaults in payment by the plaintiff. Defendant Tulger alleges that it satisfied these liens by making payments amounting to \$46,722.36. On the other hand, plaintiff Alpha alleges that problems with its sub-subcontractors and suppliers did not arise until after Tulger breached its obligations to make payments on the change orders.

On or about September 22, 2008, Tulger began a related action against Alpha in the New York State Supreme Court, County of Queens (*Tulger Construction Corp. v Alpha Interiors, Inc.*, Index No. 23739/08) asserting four causes of action, the first for breach of contract, the second for fraud, the third for violation of Lien Law §§ 39 and 39-a, and the fourth for violation of Article 3-A of the Lien Law. Pursuant to a decision and order dated April 6, 2009 (one paper), this court dismissed the second, third, and fourth causes of action asserted against Alpha pursuant to CPLR 3211.

Plaintiff Alpha began this action for, inter alia, breach of contract on or about October 23, 2008. Defendant Tulger answered and asserted four counterclaims, the first for

breach of contract, the second for fraud, the third based on Lien Law §§ 39 and 39-a, and the fourth based on an alleged violation of Article 3-A of the Lien Law.

That branch of plaintiff Alpha's motion which is for summary judgment on its cause of action for breach of contract is denied." [T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) Plaintiff Alpha successfully carried this burden by establishing a prima facie case for breach of contract." [A]n action for breach of contract requires proof of (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages ***." (*Rexnord Holdings, Inc. v Bidermann*, 21 F3d 522, 525; *First Investors Corp. v Liberty Mutual Ins. Co.*, 152 F3d 162; *Furia v Furia*, 116 AD2d 694; *WorldCom, Inc. v Sandoval*, 182 Misc2d 1021; *Lehmann v Lehmann*, 182 Misc2d 22.) Plaintiff Alpha submitted documentary evidence establishing a contract, including the change orders, with defendant Tulger, the affidavit of Bruce Corby establishing performance of the base contract and change orders, and affidavits alleging breach by reason of partial non-payment. The burden on this branch of the motion shifted to defendant Tulger to produce evidence showing that there is a genuine issue of fact which must be tried. (*See, Alvarez v Prospect Hospital, supra.*) Defendant Tulger successfully carried this burden. There is an issue of fact concerning whether plaintiff Alpha breached the subcontract by not providing back up documentation allegedly required by the change order procedure specified in the contract between Tulger and the village. It is true, as plaintiff Alpha asserts, that general incorporation clauses in a construction subcontract "incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor ***." (*Bussanich v 310 East 55th Street Tenants*, 282 AD2d 243, 244; *see, Waitkus v Metropolitan Housing Partners*, 50 AD3d 260; *Adams v Boston Properties Ltd. Partnership*, 41 AD3d 112; *CooperVision, Inc. v Intek Integration Technologies, Inc.*,

7 Misc3d 592; 4B N.Y. Prac., Com. Litig. in New York State Courts § 86:17 [2d ed.]) Plaintiff Alpha's reliance on this principle is misguided. First, the change order procedure established by the prime contract is a provision "relating to the ***manner of the work to be performed by the subcontractor." Compliance with sections of the prime contract controlling approval of change order work was part of the way in which change order work was to be accomplished. Second, the subcontract between Tulger and Alpha incorporates the change order procedure found in the prime contract through specific incorporation clauses, and not just through the general incorporation clause found in Section 1.1. Section 11.9.1, applicable to "changes in the Work," and Section 11.10.1, applicable to "all claims *** for additional cost *** or other causes" specifically require the subcontractor to proceed "*in a manner consistent with the Contract Documents*" (italics added) and "*in accordance with the Contract Documents*" (italics added) respectively. Finally, the court notes that there are also issues of fact concerning whether plaintiff Alpha breached the subcontract by failing to pay sub-subcontractors and suppliers, and, if so, whether defendant Tulger unjustifiably caused that non-performance. (*See, Ward v Melis*, 28 AD3d 970.)

That branch of plaintiff Alpha's motion which is for summary judgment dismissing defendant Tulger's counterclaims pursuant to CPLR 3211(a)(4) (another action pending) and CPLR 3211(a)(5) (res judicata) is granted. The cross motion by defendant Tulger for, inter alia, summary judgment on its first counterclaim for breach of contract is denied. The first counterclaim, duplicative of a cause of action previously asserted by the counterclaimant in *Tulger Construction Corp. v Alpha Interiors, Inc.*, (Index No. 23739/08), is subject to dismissal on the ground of another action pending. (*See, Benenson v SKEK Associates*, 293 AD2d 694.) The second, third, and fourth counterclaims are subject to dismissal on the ground of res judicata in light of this court's decision and order dated April 6, 2009 dismissing the same claims made in the related action. (*See, Pawling Lake Property Owners Association, Inc. v Greiner*, 72 AD3d 665.)

Short form order signed herewith.

J.S.C.