

DHE Homes, Ltd v Jamnik

2010 NY Slip Op 32392(U)

August 26, 2010

Supreme Court, Nassau County

Docket Number: 008542/2007

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

DHE HOMES, LTD. and DANIEL HOROWITZ,
Individually,

Plaintiffs,

-against-

INDEX NO.: 008542/2007
MOTION DATE: 06/28/2010
MOTION SEQUENCE: 002

ALAN JAMNIK, ROCHELLE JAMNIK, and
"JOHN DOE #1" through "JOHN DOE #10, said
names being fictitious and unknown to Plaintiff, the
persons or parties intended being the person or parties,
if any, having or claiming an interest in or lien upon
the premises described in the Verified Complaint,

Defendants.

The following papers were read on this matter:

Notice of Motion, Affidavit & Exhibits Annexed	1
Plaintiffs' Memorandum of Law in Support of Motion	2
Affidavit of Alan Jamnik in Opposition & Exhibits Annexed	3

PRELIMINARY STATEMENT

Plaintiff moves for partial summary judgment in the amount of \$45,535 on the First Cause of Action, and for dismissal of the defendants' counterclaims. Defendant contends that factual issues as to the status and quality of the work performed preclude the grant of summary judgment.

BACKGROUND

Plaintiff and defendants entered into a construction contract on or about May 21, 2003. Exh. "A" to Motion. The contract called for plaintiff to provide labor, equipment and materials with a value of \$435,000 in connection with a project 3 Livengood Court, Woodbury, New York. The project called for the demolition of an existing home and its replacement by a new one. Annexed to the contract were specifications dated May 19, 2003 which set forth the scope of work to be performed by DHE. Exh. "B" to Motion. The specifications were modified from time to time based upon changes of the scope of work. An addendum to the contract is submitted as exhibit "C" to the motion.

At some point in time that there was concern expressed by DHE that the plans, as drafted by the architect, may either not meet the local building code or will be structurally sound. Mr. Jamnik entered into an agreement on May 19, 2003 whereby DHE agreed to provide additional services with respect to the design of the house. Defendants agreed to pay \$150,000 for the service. Plaintiff claims that the house complies with building codes and is structurally sound, and there remains a balance of \$9,370 owed to DHE under the design agreement.

The plaintiff contends that defendants negotiated 48 additional work orders "Approved Change Orders" which increased the price of the construction contract by \$278,534, bringing the total price to \$872,904. Copies of the approved change orders are annexed as exhibit "F". In addition to the change orders, plaintiff contends that it performed "Extra Work" at the specific request of defendants, and that the fair and reasonable value of the extra work is \$88,189. Plaintiff states that it is not seeking summary judgment with respect to the claimed extra work but does intend to prove its entitlement to payment for this extra work at the trial of the action.

Disputes arose in or about the early part of 2005, primarily as to whether certain work was within the scope of work set forth in the construction contract, and the adequacy and completeness of certain items of work, as well as who was responsible for

delays in the progress of the project. In an effort to resolve these issues, on or about February 8, 2005 the parties agreed to a "punch list" of open items and the sums of money that defendants would withhold from DHE until the items were completed. At that point the parties agreed that \$10,975 would be withheld for these punch list items. The punch list is annexed as exhibit "G".

Shortly thereafter, on February 16, 2005 the parties entered into a further agreement in which they sought to modify the construction contract and resolve all outstanding disputes between the parties. This Supplemental Agreement is annexed as exhibit "H". Among the most significant provisions of the agreement, as claimed by plaintiff, are the following:

- DHE was not required to install sheet rock in the attic;
- defendants waived any claims for delay damages against DHE;
- DHE would install cedar shingles on a backyard shed ;
- DHE would finish the room above the garage; and
- DHE would not be required to obtain a building permit or a certificate of occupancy for the room above the garage.

At the conclusion of exhibit H. Is a statement that the total amount owed to the contractor by the owner is \$50,870 plus extras minus credits and that payment would be made as follows:

- \$15,000 upon execution of the amendment
- \$10,000 upon completion of the room above the garage
- the remainder in accordance with the terms of the original contract .

Plaintiff paid \$15,000 upon execution of the amendment , leaving an unpaid balance of \$35,870 plus extras minus credits due to DHE. Plaintiff claims to have procured and air-conditioner permit at a cost of \$220 and renewed the building permit at a cost of \$75 which, added to the \$9,370 on the design agreement, producing a claimed entitlement of \$45,535 for the construction contract, the approved change order work and

the procurement of these two items. Plaintiff contends that defendants have failed it to pay the sum of \$45,535 and have also refused to negotiate a price for the extra work.

On August 4, 2005 the DHE filed a notice on the mechanics lien in the sum of \$133,724, a copy of which is annexed as Exhibit "K". A summons and complaint on their behalf was filed on May 16, 2007 and service was made upon defendants. DHE also filed a notice of pendency on May 16, 2007, annexed as exhibit "N". Defendants answer includes counterclaims for breach of contract, negligence, and unjust enrichment. Exhibit "O". DHE replied on July 25, 2007. Exh. "P". According to plaintiff, the defendants were deposed at which time he was present but they were unable to identify any contractor retained to complete and correct DHE's work, or state how much they paid for such work.

Plaintiff contends that the evidence is undisputed that they provided all of the work that was required of them under the construction contract and the supplemental agreement which has an agreed price of \$50,870. In addition, DHE procured an air conditioning and renewal permit for a cost of \$295, and is owed \$9,370 under the design agreement . Defendants have only paid \$15,000 since the execution of the Supplemental Agreement, leaving a balance of \$45,535 unpaid.

Plaintiffs further assert that the defendants have not produced any documents in the form of repair estimates, contracts, canceled checks, receipts or other evidence to show that the work performed by DHE at the project was either defective or incomplete. For this reason, DHE claims entitlement to partial summary judgment in the sum of \$45,535 and dismissal of the counterclaims because of the failure of defendants to produce any discovery documents, photographs or video that showed defects or incompleteness of the work.

Defendants controvert the claim of the plaintiffs that all of the work required to be performed has been completed. They point to the punch list dating back to February 8, 2005 as evidence of incomplete work and annex as Exhibit "B" a punch list of their own

which is undated. In that document they contended that the value of the work that had yet to be completed was \$49,200 and according to the document “does not include credits and work yet to be completed”. Plaintiffs claim that the shed has never been shingled despite the February 16, 2005 agreement that this would be done. An inspection of the premises by the plaintiff on September 22, 2009 was videoed by defendant and they contend that the shows that the shed was not yet shingled and that numerous other items in the home were not complete.

Defendants also annex a report by RAD Construction Consultants which ostensibly shows defective or incomplete work having a value of \$103,533.65.

DISCUSSION

When presented with a motion for summary judgment, the function of a court is “not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact.” (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley’s Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must “ ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether

the facts as alleged fit within any cognizable legal theory' ". (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The parties at one point seemed relatively close to resolution with competing punch lists. At this juncture defendant now produces a rather extraordinary report claiming \$103,553.65 for repair or replacement of work done by plaintiff. This constitutes a question of fact as to whether or not defendant adequately performed in accordance with the Supplemental Agreement, which was intended to remedy all outstanding issues between the parties. This question of fact precludes the grant of summary judgment as requested by plaintiff. The motion for partial summary judgment is denied.

Plaintiff also seeks dismissal of counterclaims for breach of contract and warranty, negligence, and cost of work, labor and services. Defendant has not produced any documentary evidence of expenditures that they have actually incurred, but in response to this motion, submit an estimate from a company in the amount of \$103,553.65 for estimated future costs. The standard on this motion is whether or not they adequately state a claim against plaintiff.

General Business Law § 777-a (1)(a) imposes a one-year warranty upon construction of a new home. This, as well as a claim of negligence, may exist separate and apart from the claimed breach of contract. This is so when a party has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct apart from its obligation to fulfill contractual obligations. (*New York University v. Continental Insurance Co.*, 87 N.Y.2d 308 [1995]).

In this case, there does not appear to be any claim of negligence separate and apart from the contract and warranty claim contained in the first counterclaim. The negligence counterclaim is dismissed. The motion to dismiss the third counterclaim is denied, in that defendant has produced some evidence of the amount claimed to be necessary to repair or complete the work called for under the contracts between the parties.

The motion to dismiss the first and third counterclaim is denied. The motion to dismiss the second counterclaim is granted.

The matter is presently scheduled for a pre-trial conference on September 13, 2010.

This constitutes the Decision and Order of the Court.

Dated: August 26, 2010


J.S.C.

ENTERED
AUG 30 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE