

Durao Concrete, Inc. v RJD Constr., Inc.

2010 NY Slip Op 33365(U)

December 3, 2010

Sup Ct, Suffolk County

Docket Number: 39494/2007

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

DURAO CONCRETE, INC.,

Plaintiff,

-against-

RJD CONSTRUCTION, INC. and CAROLINA
CASUALTY INSURANCE COMPANY,

Defendants.

ORIG. RETURN DATE: JANUARY 5, 2010
FINAL SUBMISSION DATE: JULY 29, 2010
MTN. SEQ. #: 004
MOTION: MOT D

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Upon the following papers numbered 1 to 7 read on this motion _____
FOR PARTIAL SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Affidavit and Affirmation in Opposition 4, 5;
Replying Affidavit and supporting papers 6, 7; it is,

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 3212, granting plaintiff partial summary judgment on its Second, Third, Fourth and Sixth causes of action and directing the entry of judgment in favor of plaintiff and against defendants, RJD CONSTRUCTION, INC. and CAROLINA CASUALTY INSURANCE (collectively "defendants"), in the amount of \$40,000, together with interest thereupon from May 10, 2007, and an award of punitive damages, is hereby **GRANTED** to the extent set forth hereinafter.

Plaintiff alleges that it was hired as a subcontractor by defendant RJD CONSTRUCTION INC. ("RJD") in connection with a construction project at 15 German Boulevard, Yaphank, New York ("property"), owned by non-party Developmental Disabilities Institute, Inc. ("DDI"), whereby plaintiff would provide labor, material and services necessary to install a concrete foundation, footings, walls and slabs to the property. The parties' agreement allegedly provided that plaintiff would be paid \$40,000 for the foundation work. Plaintiff alleges that it

completed its work at the property on August 6, 2007, and submitted invoices to RJD seeking payment. Plaintiff alleges that it submitted invoices to RJD twice, first when the footings and walls were completed and again when the slab was completed. Plaintiff claims that RJD accepted the invoices, but failed to pay plaintiff at all for its services. On or about December 3, 2007, plaintiff filed a Mechanic's Lien against the property.

Plaintiff commenced the instant action against RJD on December 7, 2007, but subsequently amended its complaint to include CAROLINA CASUALTY INSURANCE COMPANY ("CCI") as a defendant after it posted a bond on behalf of RJD discharging the Mechanic's Lien against the property. By way of its amended complaint, plaintiff asserts causes of action against defendants based upon breach of contract, unjust enrichment, and violation of the Lien Law.

Plaintiff now moves for partial summary judgment on its Second, Third, Fourth and Sixth causes of action, to wit: breach of contract, unjust enrichment, foreclosure of the surety bond, and conversion, and seeks the entry of judgment in favor of plaintiff and against defendants in the amount of \$40,000. By Order dated July 6, 2010, the Court adjourned this application due to a clerical error with respect to the filing of defendants' opposition hereto, so that the Court may decide this application on a full and complete record.

Plaintiff argues that the affidavit of Celia Durao, an officer of plaintiff, as well as the deposition testimony of Richard Dailey, RJD's principal, establish that plaintiff rendered services as a subcontractor to RJD in connection with the subject construction project at the property, that RJD accepted payment from the property owner for such services, and that RJD has refused to pay plaintiff for its work despite repeated demands for the same. Plaintiff informs the Court that Mr. Dailey testified at his deposition that he agreed to pay plaintiff \$40,000 for certain foundation work as contained in a proposal and estimate dated March 8, 2007, which Durao did in fact complete. In addition, plaintiff contends that at his deposition, Mr. Dailey identified RJD's contract with DDI and confirmed that RJD was to receive \$591,375.20 as payment for the project. He further testified that RJD was paid for its work on this project and identified checks totaling \$611,101.00, which RJD received and deposited.

Moreover, plaintiff argues that the funds received by RJD from DDI were received "under or in connection with a contract for the improvement of real property," and as such, constitute trust assets under Lien Law § 70 *et seq.*, which were to be retained by RJD as trustee to pay their subcontractors (see Lien Law § 71 [2] [a]).

In opposition to the instant application, RJD acknowledges that “some money” may be due and owing plaintiff, but claims that there are genuine issues of material fact with regard to the actual amount due. RJD indicates that it agreed to pay plaintiff \$40,000 for the work, but plaintiff demanded \$41,800 after completion of the work. As such, RJD refused to pay plaintiff any monies after completion. In addition, RJD contends that the foundation plaintiff was hired to pour was “not properly done and resulted in cracks.” Moreover, RJD alleges that prior to this litigation, the parties met and agreed on a compromise figure to be paid to plaintiff to “settle most of the outstanding jobs, this job included,” which RJD allegedly paid to plaintiff. However, RJD does not indicate what that compromise figure was, or how or when it was paid, and has not submitted any supporting documentation thereof. RJD contends that it no longer has any records concerning this meeting as the records were lost in a flood.

In reply, plaintiff argues that defendants do not deny that monies are due and owing to plaintiff with regard to the subject construction project, and thus, seeks summary judgment on the issue of liability and an inquest to assess damages. Plaintiff further argues that the deposition testimony of Mr. Dailey was corroborated by the deposition testimony of Darell Miron, RJD’s project manager and foreman assigned to the property, and demonstrate that plaintiff completed the work as contained in its initial proposal and estimate. Further, plaintiff indicates that in opposing the instant motion, RJD for the first time asserts that plaintiff’s work was not properly done and resulted in cracks. Notwithstanding this allegation of faulty workmanship, plaintiff contends that RJD was paid in full by DDI for the project, and was even paid an amount that exceeded the amount originally agreed upon.

Furthermore, plaintiff alleges that RJD expressly admits that it did not pay plaintiff for the work because the invoice submitted by plaintiff sought payment of \$41,800 rather than the \$40,000 agreed upon. Plaintiff informs the Court that the additional \$1,800.00 was for the use of a pump truck to pump the cement to the job. However, the Court notes that while this amount is not part of the original estimate and is in dispute, plaintiff has expressly excluded the same from the relief sought in the instant motion.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to

judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Comms. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that plaintiff has made an initial *prima facie* showing of entitlement to summary judgment on the issue of liability (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). Plaintiff has established that RJD agreed to pay plaintiff \$40,000 for its work at the property; that plaintiff performed the work at the property in accordance with its initial proposal and estimate; that RJD received payment in full from DDI for the construction project; and that RJD failed to pay plaintiff any monies with respect to the work performed. In opposition, RJD for the first time claims that the work was not properly performed, and that it paid plaintiff a compromise figure which encompassed the claim herein, albeit without specifics as to the date or amount of the payment and without any supporting proof thereof. General conclusory allegations which contain no specific factual references cannot defeat a motion for summary judgment where the movant's papers make out a *prima facie* basis for the grant of the motion (see *Marine Midland Bank, N. A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [1990]; *Doran v Mutual Ben. Life Ins. Co.*, 106 AD2d 540 [1984]; *Bank of New York v Progressive Phone Systems, Inc.*, 71 AD2d 1010 [1979]). Although RJD indicates that it lost its records in a flood, Mr. Dailey testified that such compromise payment was made by check. Thus, the Court finds that RJD could have obtained and submitted duplicate records from its banking institution. In view of the foregoing, that branch of plaintiff's motion for partial summary judgment is **GRANTED** on the issue of liability.

However, with respect to plaintiff's claim for punitive damages, in general, punitive damages are available only in those limited circumstances where it is necessary to deter a defendant and others like him from engaging in conduct that may be characterized as "gross" and "morally reprehensible," and of "such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603 [1994], quoting *Walker v*

Sheldon, 10 NY2d 401 [1961]). Regarding this action, unauthorized disbursement of trust assets, without satisfying the claims of contractors or subcontractors, constitutes larceny punishable under the Penal Law (see Lien Law § 79-a) and “thus, would clearly satisfy the high threshold of moral culpability necessary to support a punitive damages award” (*Sabol & Rice v Poughkeepsie Galleria Co.*, 175 AD2d 555, 557 [1991]; see *Pinnacle Envtl. Sys. v R.W. Granger & Sons*, 245 AD2d 773 [1997]; *Westinghouse Elec. Supply Co. v Pyramid Champlain Co.*, 193 AD2d 928 [1993]; see also *ARA Plumbing & Heating Corp. v Abcon Assoc., Inc.*, 44 AD3d 598 [2007]). Here, there has been no allegation that RJD improperly diverted trust funds for purposes not authorized by Lien Law § 71 (2) (see also Lien Law § 72), or that any member of RJD has been convicted of larceny in connection therewith. Accordingly, on this record, the Court finds that punitive damages are not warranted. As such, that branch of plaintiff’s motion for seeking an award of punitive damages is **DENIED**.

Upon service of this Order with notice of entry upon defendants, the Calendar Clerk of this Court is directed to place this action of the Calendar Control Part Calendar for the next available date for a trial as to damages. Plaintiff is reminded that a Note of Issue must be filed prior to trial.

The foregoing constitutes the decision and Order of the Court.

Dated: December 3, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION