

Minelli Constr. Co., Inc. v Volmar Constr., Inc.
2010 NY Slip Op 33776(U)
February 17, 2010
Supreme Court, Queens County
Docket Number: 25111/08
Judge: Peter Joseph Kelly
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

MINELLI CONSTRUCTION CO., INC.,

INDEX NO. 25111/08

Plaintiff,

MOTION

- against -

DATE DECEMBER 1, 2009

VOLMAR CONSTRUCTION, INC., ET AL,

MOTION

CAL. NO. 16

Defendants.

MOT. SEQ.

NUMBER 3

The following papers numbered 1 to 16 read on this motion by the plaintiff for partial summary judgment against defendants Volmar Construction, Inc. (Volmar) and Travelers Casualty and Surety Company of America (Travelers) pursuant to CPLR §3212 on its claim for \$498,000 plus interest and attorneys' fees pursuant to State Finance Law §137, and severing those portions of the complaint that seek recovery of extra work performed by plaintiff having a value of \$12,000.

PAPERS
NUMBERED

Notice of Motion/Affid(s)-Exhibits.....	1 - 6
Answering Affidavits-Exhibits.....	7 - 12
Reply Affidavits.....	13 - 16

Upon the foregoing papers it is ordered that the motion is determined as follows:

Volmar, a general contractor, and defendant New York City School Construction Authority (SCA) entered into an agreement known as the Public School 3 Queens, School Renovation and Addition, Early Childhood Center, 108-55 69th Avenue, Queens, New York 11375, SCA07-00096G-1 contract (the general contract) for the renovation of a public school in Queens (the project).

Plaintiff alleges that on March 3, 2008, Volmar entered into a subcontract with plaintiff for certain masonry repairs on the project (the subcontract); that the subcontract had a base price of \$498,000; that at the special instance, request and/or

direction of Volmar plaintiff performed additional work, provided additional labor and services, and supplied additional materials, having an agreed price and/or reasonable value of \$12,000; and that this resulted in an adjusted subcontract price of \$510,000.

Plaintiff further alleges that it performed all its contractual obligations, including all additional work on its part to be performed except to the extent, if any, that Volmar interfered with and prevented plaintiff from so performing; that Volmar breached the subcontract by, among other things, failing to make payments to plaintiff; that Volmar paid plaintiff no part of the \$510,000 adjusted subcontract price; and that Volmar, thus, owes plaintiff \$510,000 plus interest.

Based upon these allegations, plaintiff interposed causes of action for breach of contract, and filed a lien with SCA against Volmar, claiming \$510,000 of the monies due Volmar for the project. Plaintiff now moves for partial summary judgment against Volmar and Travelers for \$498,000, representing the balance due plaintiff under the subcontract, together with interest and attorneys' fees pursuant to State Finance Law §137.

In support of the motion, plaintiff submitted the affidavit of Joseph Spano, a Notice of Claim dated September 24, 2008 (the Notice of Claim), the deposition testimony of John P. Volandes for Volmar, a Labor and Material Payment Bond for \$10,392,000 with Volmar as principal and Travelers as surety (the Payment Bond), and letters and facsimiles between Spano and Volmar.

In his affidavit, Mr. Spano states that he is the Vice-President of plaintiff; that he is personally familiar with the facts and circumstances surrounding this action; that on or about March 3, 2008, Volmar sent plaintiff a "Letter of Intent" which contained all of the material terms of an agreement between Volmar and plaintiff for work at the project. Attached to Mr. Spano's affidavit is Bulletin No. 11, dated November 13, 2007, and a Letter of Intent, dated March 3, 2008, addressed to plaintiff at Mr. Spano's attention (the Letter of Intent). Bulletin No. 11 states that it is for exterior masonry repair at the project. The Letter of Intent provides, among other things, that Volmar intends to enter into a subcontract with plaintiff for the masonry repairs described in Bulletin No. 11; and that the subcontract amount will be \$498,000. The names of Mr. Spano and Artemios Marinakis, President of Volmar, are printed at the bottom of the Letter of Intent, but there are no signatures.

Mr. Spano further states in his affidavit that plaintiff completed its work on or about August 1, 2008; that Volmar deliberately concealed from plaintiff the fact that there may be a problem with payment until plaintiff was more than 90% complete with its work on the project. Additionally, plaintiff also submitted a Notice of Claim, dated September 24, 2008 (the Notice of Claim), filed by Volmar, requesting mediation of Volmar's claim against SCA for \$735,535.02, representing work performed and materials furnished under the general contract.

"[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d 105, 109 [1981]). Volmar and Travelers, however, do not identify a missing material term in the documents submitted. Rather, their opposition to plaintiff's claim of entitlement to payment points to the clause in the Letter of Intent that provides: "THIS LETTER OF INTENT AND FUTURE CONTRACT DOCUMENTS ARE CONTINGENT TO SCA APPROVAL OF SUBCONTRACTOR'S QUALIFICATION, SUBMITTALS, AND PROPOSAL." Since, they argue, SCA never approved plaintiff's proposal, the Letter of Intent never ripened into a binding subcontract for the work in Bulletin No. 11.

Volmar's Notice of Claim, however, states that on or about April 21, 2008, SCA issued a Notice of Direction (NOD) to Volmar to provide labor and materials to implement Bulletin No. 11 masonry repairs; that Volmar forward the NOD and Bulletin No. 11 to plaintiff "along with a direction to proceed with the work"; and that from about April 21 to August 29, 2008, plaintiff "fully performed the work described in Bulletin No. 11." The Letter of Intent, if not by itself a contract, at the very least memorialized plaintiff's offer to perform the work described in Bulletin No. 11 for a price of \$498,000. By instructing plaintiff to go ahead with this work, Volmar accepted this offer, and may not back out of the subcontract now or change the price simply because SCA has not approved plaintiff's proposal (See, Birk Iron Works, Inc. v Tulco, 178 AD2d 137 [1991]).

To the extent that Volmar and Travelers assert SCA's nonpayment to Volmar as a defense, such a contractual provision would be "void and unenforceable as contrary to public policy set forth in the Lien Law §34" (West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co., 87 NY2d 148, 158 [1995]).

In addition, plaintiff is entitled to interest from the date at which Volmar breached the subcontract by failing to pay plaintiff (See, CPLR §5001 [b]), calculated from the date at which

plaintiff's cause of action for payment accrued (See, Siegel, NY Prac §411, at 696 [4th ed]). The Letter of Intent does not provide for when payment would be due plaintiff. Mr. Volandes testified for Volmar that plaintiff's work on the project was substantially complete prior to August 27, 2008, and Mr. Spano's assertion in his affidavit that plaintiff completed its work on the project "on or about" August 1, 2008 is not disputed by Volmar and Travelers in their opposition. Plaintiff is, thus, entitled to interest from August 1, 2008.

As to plaintiff's request for attorneys' fees, it cannot be said that the defenses asserted by Volmar and Travelers, although ultimately unsuccessful, were without a substantial basis in law or fact and, as such, attorneys' fees may not be awarded under State Finance Law §137 (4) (c) (See, Conesco Indus. v St. Paul Fire & Marine Ins. Co., 210 AD2d 596, 599 [1994]; cf. Beninati Roofing & Sheet Metal Co. v Gelco Builders, Inc., 279 AD2d 412, 413 [2001]). In any event, the record contains no affidavit of services or any other evidence upon which the court could base an award of reasonable attorneys' fees (See, Matter of Freeman's Estate, 34 NY2d 1, 9 [1974]; Jordan v Freeman, 40 AD2d 656 [1972]).

Accordingly, plaintiff's motion is granted solely to the extent of awarding summary judgment against Volmar on the first and second causes of action, and against Volmar and Travelers on the third cause of action, in the amount of \$498,000, plus interest, from August 1, 2008. The motion is in all other respects denied. Plaintiff is given leave to enter judgment accordingly.

Dated: FEBRUARY 17, 2010

Peter J. Kelly, J.S.C.