Scan

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

ARCHSTONE f/k/a ARCHSTONE-SMITH OPERATING TRUST and TISHMAN SPEYER ARCHSTONE-SMITH WESTBURY, L.P. f/k/a ASN ROOSEVELT CENTER, LLC,

Plaintiff,

- against -

TOCCI BUILDING CORPORATION OF NEW JERSEY, INC., LIBERTY MUTUAL INSURANCE COMPANY, PERKINS EASTMAN ARCHITECTS, INC., and ELDORADO STONE, LLC,

Defendants.

INDEX NO.: 001018/2008
MOTION DATE: 1/28/2011
SEQUENCE NO.: 19

The following papers read on this motion:

Notice of Archstone's Motion for Partial Summary Judgment, Affirmation of R. Crewdson, and Exhibits 1
Archstone's Memorandum of Law in Support of its Motion 2
Tocci's Memorandum of Law in Opposition to Motion for Partial Summary Judgment . . 3
Affirmation of J. Davies in Opposition to Motion for Partial Summary Judgment and Exhibits 4
Affidavit of A. Sandonato in Opposition to Motion for Partial Summary Judgment 5
Archstone's Memorandum of Law in Reply to Tocci's Opposition to Partial Summary Judgment 6
Supplemental Affirmation of R. Crewdson in Support of Motion for Partial Summary Judgment and Exhibits 7

PRELIMINARY STATEMENT

Archstone moves for partial summary judgment to limit Tocci's counterclaims against Archstone. Archstone's Complaint against Tocci asserts claims for breach of contract and breaches of warranties related to construction of the Archstone-Westbury Project. In its Answer, Tocci asserts several counterclaims in quantum meruit and breach of contract for certain unpaid work that was performed for Archstone.

Archstone contends that Tocci's counterclaims sounding in breach of contract and quantum meruit have been waived by Tocci as part of a settlement agreement entered into as "Change Order 28" between the parties. Archstone argues that this agreement is enforceable against Tocci to estop it from asserting its counterclaims outside the scope of Change Order 28 and the original Contract documents.

BACKGROUND

This litigation arises from the construction of the Archstone-Westbury complex, consisting of 20 apartment buildings, 13 garage buildings, and a clubhouse. The project was designed by Perkins Eastman Architects, Inc. ("Perkins"). The general contractor was Tocci Building Corporation of New Jersey ("Tocci").

Around June 2007 it was determined that the buildings were suffering from persistent water intrusion and entrapment, leading to deterioration and mold conditions. Significant repair and reconstruction work was required, including the removal and replacement of the exterior walls at all 20 apartment buildings; and that the far-reaching nature of the work required the vacating of the apartments. Archstone has also faced numerous lawsuits from tenants who allegedly suffered personal injury and property damage due to water intrusion, mold conditions, and early termination of their leases. In this action, Archstone seeks to recover its damages from Tocci (among others) on claims of breach of contract, negligence, action on performance bond, and indemnity.

In it Answer, Tocci has asserted counterclaims against Archstone for breach of contract and quantum meruit in the amount of $6,690,198.00 for work that was not been paid. The amount of the counterclaims arises from the amount outstanding in the base contract and certain claims for additional costs and work performed, which Tocci submitted to Archstone in June

2006. Archstone and Tocci agree that they entered discussions to settle Tocci's claims for additional labor and material costs. At the time of the discussions, Archstone was aware of some water intrusion issues through apartment windows and was withholding approximately four hundred thousand dollars in payments, while Tocci repaired the window issues. However, the water intrusion issues were not discussed during the negotiations of Tocci's claims.

The discussions between Tocci and Archstone surrounding Tocci's claims for additional costs and work performed, resulted in an agreement that was entered into as "Change Order #28." In relevant part, the agreement provides:

> This Change Order #28 in the amount of $1,595,585 INCREASE to the GMAX represents full and final settlement of all claims, demands and charges from Tocci Building Corporation of New Jersey …
> … Contactor and Owner agree that payment of this final Change Order #28 shall be made in the following manner:

Installment #	Installment amount	Installment paid
1	$ 662,740	Upon Execution & Return of this (i) CO#28, (ii) Exhibit 'I,' (iii) a Final Conditional Release of Lien by Contractor an (iv) a Final Release and Satisfaction of Claims from Contractor's Legal Counsel
2	$ 932,849	Upon providing Owner with Final Sub-Contractor Lien Release for the Sub-Contractor's listed in Column 'C' entitled 'Potential Exposures' of Exhibit 'C' attached hereto with this Final Change Order #28

> ***
>
> All Terms and Conditions of the Contract for Construction between the CM/GC and Owner ('Archstone-Smith') shall remain in full force and effect. This Change Order does not modify the Contract in any capacity whatsoever other than to adjust the Contract Amount and/or Contract Time as indicated herein.

(Crewdson Aff., Ex. 6).

The parties do not dispute that Tocci provided the required documents and releases, and that Archstone has not paid any of the installments due under the settlement agreement entered into as Change Order 28.

STANDARD

Partial summary judgment determines an issue before trial when there is no dispute of material fact. If contrary inferences can reasonably be drawn from the evidence, then genuine issues of material fact preclude summary judgment. (*Gerard v. Inglese*, 11 AD2d 381 [2d Dep't 1960]. Thus, the evidence will be considered in the light most favorable to the opposing party. (*Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). However, a material issue of fact "must be genuine, bona fide and substantial to require a trial." (*Leumi financial Corp. v. Richter*, 24 AD2d 855 [1st Dep't 1965] quoting *Richard v. Credit Suisse*, 242 NY 346 [1926]).

If a party has presented a prima facie case of entitlement to summary judgment, because no triable issues of material fact exist, 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]).

DISCUSSION

Archstone moves for partial summary judgment to enforce a settlement agreement entered into as "Changer Order 28," and to limit Tocci's counterclaims according to that settlement. The terms of the settlement agreement, memorialized as "Changer Order 28," are unambiguous. In exchange for quieting of Tocci's equitable claims that were in addition to the original contract price, Archstone agreed to pay Tocci $1,595,588.91 in two installments: the first due "upon execution & return" of the signed "Change Order #28,"signed satisfaction of claim, and a conditional release of Tocci's lien; and the second installment due "upon providing Owner with final Sub-Contractor lien release." (Crewdson Aff., Ex. 6).

Archstone agrees that a Change Order modifying its Contract with Tocci supersedes any contradictory clauses in the Contract. Yet it contends that Section 9.3.1, which provides that Archstone could withhold payment for defective work that had not been remedied, supersedes the terms of Change Order 28, making payment on the settlement amount due in two installments "upon execution and return" of several releases. For its reading of the two agreements, Archstone

relies on the fact that the settlement agreement was memorialized in a standard-form change order template which included a footnote: "All Terms and Conditions of the Contract for Construction between the CM/GC and Owner ('Archstone-Smith') shall remain in full force and effect. This Change Order does not modify the Contract in any capacity whatsoever other than to adjust the Contract Amount and/or Contract Time as indicated herein." This standard-form language is simply salutary in nature and intended to preserve the parties' original Contract. It does not nullify the plain language in Change Order 28, which states that payment under the settlement "shall be made" in two installments "upon execution and return" of several releases.

It is undisputable that in exchange for quieting of Tocci's claims and release of several mechanics' liens, Archstone was to pay Tocci two installments *upon* receiving several documents. Archstone does not dispute the ordinary and plain meaning of "upon execution & return" as meaning anything other than "as soon as you execute and return." In fact, Garner, *A Dictionary of Modern Legal Usage*, 2d ed., notes that "[t]he sense 'with little or no interval after' is often an important nuance" when the term "upon" is used in a legal context. Thus, "upon execution & return" is legally interpreted as "with little or no interval after execution & return." Archstone received the releases, yet it did not pay Tocci any installment due under the agreement. In this fashion, Archstone has denied the benefit of the bargain to Tocci—payment of Change Order 28—yet it expects to extract from Tocci *its* own benefit of the bargain—that is, quieting Tocci's claims.

Extrinsic evidence supports the plain and ordinary meaning of Change Order 28. While extrinsic evidence cannot be offered to contradict the plain terms of a contract, it may be offered to support its plain meaning. (*WWW Assoc., Inc. v. Giancontieri*, 77 NY2d 157 [1990], *Addison v. Addison*, 192 AD2d 334 [1st Dept. 1993]; *see* 22 NY Jur2d Contracts § 222). In any case, the footnote upon which Archstone relies for its reading of Change Order 28, at most creates an ambiguity that is resolved by extrinsic evidence. The various emails that were exchanged between Tocci and Archstone indicate that all parties expected that Archstone had agreed to provide payment on Change Order 28 as soon as Tocci produced the necessary releases and signed documents. (Davies Aff., Exs. H, I, J, M). Indeed, Archstone admits that its internal conversations reveal that it did not even contemplate the possibility of withholding payment until

well after Change Order 28 was signed. (Pl. reply mem. 12). Although Archstone represented and agreed in Change Order 28 to provide payment upon Tocci's delivery of the required documents, it failed to do so.

A party cannot seek enforcement of a contract that it has repudiated or breached. (*Bercow v. Damus*, 5 AD3d 711 [2d Dep't 2004], *American List Corp. v. U.S. News & World Report, Inc.*, 75 NY2d 38, 44 [1989]). Having breached the settlement agreement entered into as "Change Order 28," Archstone cannot then seek to enforce it as against Tocci, to estop Tocci from making a full demand of its claims. Although Tocci could seek damages for breach of the settlement agreement, the law does not force it to seek that remedy. Rather, the law relieves it of any duty to perform (*see Tenavision, Inc. v. Neuman*, 45 NY2d 145 [1978])—in this case, any promise it entered to quiet its equitable claims—and it permits the party who has suffered the breach to choose its remedies.

Even if the court were to ignore the plain language of Change Order 28 requiring payment in two installments as soon as the named documents were received, Archstone's reading of Change Order 28 is legally unsupportable and would require this court to invalidate the contract for mutual mistake of fact and lack of consideration.

Archstone admits that when it negotiated and entered into the settlement agreement with Tocci, it had no intention to withhold any payment from the settlement sum. Both Tocci and Archstone understood that there were some window leak issues in some apartments, but they did not understand the magnitude of the problems. Their agreement thus rested on the important assumption that the circumstances were such that no withholding or setoff needed to be contemplated. (Pl. reply mem. 10-11). Therefore, the negotiations and agreement do not encompass any terms for the circumstances as they were later revealed to be. In other words, both parties contracted into a settlement agreement under mistaken facts. In fact, it is unlikely that Archstone would have agreed to pay *any* sum on Tocci's equitable claims for payment, if Archstone had known the extent of the water intrusion issues. Such a mutual mistake of fact as to critical circumstances surrounding Archstone's and Tocci's settlement agreement, indicates there was no agreement at all. Indeed, the circumstances of the water intrusion problems that were later revealed, made it impracticable for Tocci to absorb the costs of curing any construction defects,

and for Archstone to incur further loss by paying Tocci the sum due under Change Order 28. Such impracticability, resulting from mutual mistake of fact, would also militate in favor of voiding the agreement.

Archstone's reading of Change Order 28 is also problematic in that Archstone's promise to pay, subject to its independent calculation of setoff, would be so indefinite that the agreement would lack consideration and thus be unenforceable. A promise to pay some amount at the discretion or satisfaction of the payor creates an illusory promise, unless a good faith, objective standard can be imposed on the payor's discretion to pay. (*See* 22 NY Jur 2d Contracts § 82). On the one hand, Section 9.3.1 of the Contract documents would not invalidate the original Contract, since that clause only permitted Archstone to withhold payment in good faith, as a means to encourage Tocci to complete its contractual obligations, cure any defects, as well as to protect Archstone from continuing loss. Similarly, Section 9.5.1 permitted Tocci to cease work in order to encourage Archstone to make continuing payments on the contract, continue to work with Tocci to resolve any issues, and to protect Tocci from continuing loss. These two clauses worked in tandem to encourage the parties to maintain the contractual relationship during construction. On the other hand, the construction project had ended at the time that Tocci and Archstone entered into Change Order 28. The Draw Inspector had determined that the construction project had been completed in a sufficiently satisfactory manner to entitle Tocci to payment. Therefore, if there were any good faith standard that this court could apply to save Archstone's otherwise illusory promise to pay—as Archstone understands it—, it would require at least a similar independent, good faith determination. Instead, what we have is Archstone's *sua sponte*, independent determination that it had valid legal claims for breach of warranties against Tocci, and its own, extra judicial calculation of the setoff that it could apply to its payment obligations under Change Order 28. Such subjective and independent determinations of its obligations to pay under Change Order 28 are only in the nature of an illusory promise to pay. Archstone's proposed reading of Change Order 28 would therefore render it unenforceable for lack of consideration.

Archstone's motion for partial summary judgment is denied. Tocci may proceed at trial to prove its counterclaims in quantum meruit or breach of contract. This constitutes the decision and order of this court.

DATED: February 2, 2011

J.S.C.