

Zip Sys., Inc. v Lettire Constr. Corp.

2011 NY Slip Op 31378(U)

May 24, 2011

Sup Ct, NY County

Docket Number: 600820/10

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 53

Index Number : 600820/2010

ZIP SYSTEMS, INC.,

vs

LETTIRE CONSTRUCTION CORP.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/18/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
FILED	<u>1-3</u>
	<u>4-6</u>
	<u>7-10</u>

MAY 25 2011

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

is
decided by the annexed decision & order.

N.B. - ~~the motion~~ Preliminary Conference is scheduled for 6/20/11 at 11 AM

Dated: 5/24/11

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----- X

Zip Systems, Inc.

Index No. 600820/10

Plaintiff,

DECISION and ORDER

- against -

FILED

Lettire Construction Corp.,

MAY 25 2011

Defendant.

----- X

NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Plaintiff Zip Systems, Inc. (Zip) moves, pursuant to CPLR 3212, for an order striking defendant's answer and for summary judgment on its claim based on breach of contract, with interest and costs.

Defendant Lettire Construction Corp. (Lettire) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and granting it judgment in the amount of \$31,027, plus interest and costs, and an award of attorney's fees based on an allegedly frivolous lawsuit.

Zip, as subcontractor, entered into a contract with Lettire, as contractor, dated October 22, 2007, to install elevators at the "Honeywell II" project, located at 906 East 178th Street, Bronx, New York in exchange for payment of \$268,000 (Subcontract). Zip claims that it performed its work under the Subcontract, Lettire defaulted on its payment obligations, and a balance in the amount of \$34,383 is due, with interest from October 31, 2008.¹

In her affidavit, Zip's office manager, Deborah Ianazzi, states that Lettire defaulted in payment under the terms of the Subcontract, in which payment was demanded, but no payment or

¹ In its original motion papers, Zip sought this amount, but in its reply papers, Zip states that it seeks \$33,683, because it is waiving a \$700 mechanic's lien filing fee.

objections were made. Attached to the affidavit is, among other items, account statements and invoices.

Zip sent two notices to Lettire, dated November 17, 2008 and December 1, 2008, purportedly stating that Lettire was in default, and that Zip was stopping work on the project. Zip contends that it did so in accordance with Section 4.7.1 of the Subcontract, which authorizes work stoppage based on nonpayment, and Section 7.1.1, which authorizes termination of the Subcontract for nonpayment.

John Weigele, president of Zip, asserts that Zip was ready, willing, and able to complete the job, but it was "forced" to discontinue its work pursuant to the Subcontract because of late payments and substantial underpayments by Lettire. The Subcontract provides that Zip would make periodic applications to Lettire for payment, and that Lettire would make progress payments within specified time periods. Accordingly, Zip made four applications to Lettire for payment. In addition, the Subcontract became subject to six change orders reflected in the invoices sent by Zip to Lettire, and they include both credits and debits to Lettire's account.

According to Weigele, the first payment application was made on November 7, 2007, and it was timely paid on November 20, 2007. The second was made on February 5, 2008 for \$13,500, and was paid by Lettire on June 24, 2008, more than four months late. The third application was made in September 2008 for \$193,500, and was partially paid on October 31, 2008, in the amount of \$85,000, and was never paid in full. The fourth application was made after Zip purportedly terminated the Subcontract, crediting Lettire for a payment that it made to "Global Tardiff," the equipment supplier, in the amount of \$131,727, and charging Lettire \$700 for the cost of filing a mechanic's lien against the property. Zip states that it was unable to pay

of the entire complaint, and judgment on its counterclaims in the amount of \$31,027, plus interest and costs, and an award of attorney's fees.

Discussion

In construing a contract, the court must search for the parties "probable intent," aiming to accord the contract language with a "fair and reasonable meaning" (*Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555 [1982]). The "aim is a practical interpretation" so that there is a realization of the parties' "reasonable expectations" (*id.* at 555; *Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [1st Dept 2008] [internal quotation marks and citations omitted]). The language of the relevant provisions of the Subcontract establishes the reasonable expectations of the parties as each affording the other notice prior to taking drastic action such as stopping work on the project or terminating the Subcontract. Lettire provided notice, but Zip did not do likewise.

Zip's breach of contract claim fails because it abandoned the project on December 1, 2008, without complying with the contractual procedure for doing so, as set forth in Subcontract sections 4.7.1 and 7.1.1. Dismissal of the complaint is warranted because there are no factual issues, and the documentary evidence definitely disposes of all claims as a matter of law in Lettire's favor (*Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]).

Zip contends that, on November 17, 2008, it gave notice to Lettire of its default for failure to make timely payments, and that, on December 1, 2008, it notified Lettire that it would not return to work until the account is made current and the open change orders are approved. Zip argues that this justified its work stoppage on the project, pursuant to Sections 4.7.1 and 7.1.1 of the Subcontract. Section 4.7.1 (Remedies for Nonpayment) provides:

"If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as

provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization."

This provision allows the Subcontractor to stop work seven days after written notice that is to be provided seven days after the time payment should have been made. The record does not contain evidence that Zip complied with this provision. Zip is relying upon the letter that Weigele sent to Nicolas Lettire, president of Lettire, dated November 17, 2008. In the letter, Weigele addresses problems with the installation of the elevators that are adversely affecting Zip's work. The closing portion of the notice reads: "You and I can ill afford to lock horns. Send the change order, pay your bills and we can complete this job properly." Neither those sentences, nor anything else in the communication, notified Lettire of Zip's intention to stop work if payment is not forthcoming.

The December 1, 2008 letter that Zip sent constituted notice that it was stopping work because of nonpayment. It states, in part: "We will not be able to return to your project until your account is brought current and the open change orders are approved." However, that letter accompanied the work stoppage, rather than preceding it by seven days, as required by Section 4.7.1. "[A] wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach" (*American List Corp. v U.S. News & World Report*, 75 NY2d 38, 44 [1989]).

Zip also failed to terminate the contract pursuant to Section 7.1.1 (Termination by the Subcontractor), which provides:

"The Subcontractor may terminate the Subcontract for the same reasons and under

the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, Sub-subcontractors or their agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to material, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.”

This provision gives the Subcontractor two grounds to terminate the Subcontract: (1) “for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract,” or (2) “for nonpayment of amounts due under this Subcontract for 60 days or longer.” Of these two grounds, Zip is claiming that it terminated the Subcontract for nonpayment, but it did not do so in accordance with the 60-day requirement. Zip seeks interest for nonpayment from October 31, 2008, the date upon which it thereby is claiming that payment was due, but which is less than 60 days from December 1, 2008, which is the date that it stopped working on the project.

In addition to dismissal of the breach of contract cause of action, Lettire is entitled to dismissal of the second and third causes of action, for an account stated and unjust enrichment, respectively.

“An account stated is an account, balanced and rendered, with an assent to the balance either express or implied” (*Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995]). Zip cannot prevail on this claim because there was a dispute about the performance of the work and the failure to pay the equipment supplier, as evidenced by Lettire’s letter dated October 3, 2008. Thus, Lettire did not assent to the balanced allegedly owed, either expressly or impliedly. Zip also argues that the partial payment in the amount of \$85,000 constitutes

ratification of the \$193,500 invoice. However, Zip itself notes that Lettire changed the invoice amount from \$193,500 to \$85,000, thereby acknowledging that Lettire did not ratify the amount allegedly due.

Unjust enrichment is also unavailable as a means of recovery because of the existence of a contract governing the parties' rights (*American Curtainwall, Inc. v NTD Constr. Corp.*, 83 AD3d 597 [1st Dept 2011]).

As for Lettire's cross motion for damages on its counterclaim for breach of contract, Lettire has demonstrated entitlement to summary judgment as to liability, and there is no basis to strike the answer. Subcontract section 7.2.1 (Termination by the Contractor) provides:

"If the Subcontractor persistently or repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within seven days after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, after seven days following receipt by the Subcontractor of an additional written notice and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and the other damages incurred by the Contractor and [sic] not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor."

Lettire sent to Zip a "48 HOUR NOTICE OF NON PERFORMANCE" letter, dated October 3, 2008. The notice directed Zip to "man the above referenced project within 48 hours of this notice. Should you fail to start the installation of the elevator by Tuesday October 8, 2008. [sic] We will take actions against your firm." The notice also specified alleged problems with Zip's performance, such as the failure to provide shop drawings, and the failure to provide for the delivery of equipment. On December 29, 2008, counsel for Lettire issued a notice of

termination due to Zip's failure to pay the elevator manufacturer for the equipment and Zip's abandonment of the project.

Technically, Lettire may not have followed exactly the provision to terminate the Subcontract, because, in addition to giving the requisite notice on October 3, 2008, it was to provide an "additional written notice." However, as discussed above, Zip had previously breached the Subcontract by abandoning its work on the project on December 1, 2010.

Furthermore, Zip has not raised this as an issue, and it does not contend that the termination by Lettire was not proper. Zip argues only that Lettire's termination is a nullity because it, Zip, was the first party to terminate the Subcontract, but, as asserted by Lettire, it failed to do so in accordance with the provisions of the Subcontract. In contrast, Lettire objected to the validity of Zip's purported termination on two grounds: (1) the failure to give any notice prior to stopping work, and (2) stopping work on a date less than 60 days after the payment was allegedly due.

As for damages, Lettire, as contractor, "is entitled to recover the fair market value of completing the work where the subcontractor has defaulted without substantially completing the subcontract" (*Citnalta Constr. Corp. v Caristo Assoc. Elec. Contrs.*, 244 AD2d 252, 253 [1st Dept 1997]). Lettire claims that it paid an additional \$31,027 over the allegedly reduced Subcontract price of \$262,500 to complete the work that Zip failed to perform. However, Zip challenges Lettire's claim of a reduction from the Subcontract price from \$268,000 to \$262,500. This, as well as issues of fact as to disputed change orders, cannot be decided on these papers. Therefore, an assessment of damages is warranted.

Lettire is entitled to interest on the damage award to be determined from April 23, 2010,

the date of the answer with counterclaims. The record does not contain any indication that Lettire sought to recover the additional amount paid to complete the Subcontract prior to the serving of its answer.

The request for sanctions is denied. Lettire has not articulated the basis for such award, and, therefore, it has not made an adequate showing for sanctions. The complaint is not frivolous.

Accordingly, it is

ORDERED that the motion by Zip Systems, Inc. for summary judgment and to strike the answer is denied; and it is further

ORDERED that the cross motion for summary judgment by Lettire Construction Corp. on the counterclaims in its answer is granted as to liability on the counterclaim for breach of contract in favor of Lettire Construction Corp. and against Zip Systems, Inc.; and it is further

ORDERED that an assessment of damages against Zip Systems, Inc. is directed; and it is further

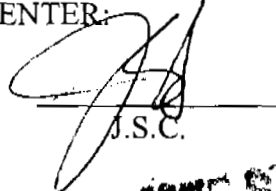
ORDERED that counsel shall appear in Part 55, 60 Centre Street, Room 432, New York, NY for a preliminary conference on June 20, 2011 at 11 AM.

Dated: May 24, 2011

FILED

MAY 25 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:

J.S.C.

JANE S. SHAW