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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA J.S.C. PART 19

Index Number : 602249/2008
BURNS, ROBERT

INDEX NO. _____

vs
FLEETWOOD LENAHAN & MCMULLAN

MOTION DATE _____

Sequence Number : 004
SUMMARY JUDGMENT

MOTION SEQ. NO. 004

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 3/13/12
which disposes of motion sequence(s) no.

FILED
MAR 16 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/13/12

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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ROBERT BURNS AND JANICE BURNS,

Plaintiffs,

-against-

FLEETWOOD, LENAHAN & MCMULLAN, LLC,

Defendant.

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Index No.: 602249/2008
Submission Date: 01/25/2012

DECISION AND ORDER

For Plaintiffs:
Hartman & Craven LLP
488 Madison Avenue
New York, NY 10002

For Defendant:
Margolin & Pierce, LLP
111 West 57th Street
New York, NY 10019

Papers considered in review of this motion for summary judgment and sanctions:

Notice of Motion 1
Mem of Law in Support
of Motion 2
Aff of Brian Lavin 3
Aff in Opposition 4

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for breach of contract, plaintiffs Robert Burns and Janice Burns (collectively "plaintiffs") move for summary judgment (1) awarding them $233,574.51 plus interest, representing the amount of fees they paid to defendant Fleetwood, Lenahan and McMullan, LLC ("FLM"); (2) reducing the basis for the fee FLM

seeks in its counterclaim; (3) determining that FLM did not perform certain provisions of its contract with plaintiffs; and (4) dismissing FLM's counterclaim.

On February 9, 2007, plaintiffs entered into a contract with FLM, whereby FLM was to provide architectural services to plaintiffs to build a house in Southampton, New York (the "AIA Agreement"). Pursuant to the AIA Agreement, FLM would collect 15% of the total construction cost of the house as its fee. The project was divided into several phases: the Schematic Design Phase, the Design Development Phase, the Construction Documents Phase, the Bidding or Negotiation Phase and the Construction Phase. Plaintiffs also retained architectural design firm, BAMO, Inc. ("BAMO") to design the interior architecture of the house.

Janice Burns attests that before February 2008, FLM had provided plaintiffs with verbal construction estimates of six to eight million dollars. In November 2007, FLM submitted a Building Permit Application to the Village of Southampton. In the application, FLM listed the project's estimated construction cost as six million dollars.

Prior to its completion, plaintiffs terminated the AIA Agreement. On February 27, 2008, FLM sent a final bill to the plaintiffs in the amount of $438,875.25. The final bill indicated that 100% of the Schematic Design Phase was complete, 100% of the Design Development Phase was complete, and 40% of the Construction Documents Phase was complete. The bill also listed the construction cost estimate as eight million dollars.

In August 2008, plaintiffs commenced this action seeking to recover damages for

breach of contract and unjust enrichment. Plaintiffs allege that (1) FLM gave them an inaccurate estimate of the construction cost; and (2) FLM missed deadlines and provided work so substandard that plaintiffs had to pay BAMO to redo FLM's work. FLM answered the complaint and interposed a counterclaim seeking to recover $438,875.25 in unpaid fees.

In December 2010, FLM moved for summary judgment, arguing that plaintiffs breached the contract by putting the project on hold and terminating the AIA Agreement. In February 2011, this Court denied that motion insofar as it sought dismissal of the breach of contract cause of action. The Court held that there were issues of fact as to FLM's obligations and performance under the AIA Agreement. The Court did dismiss the unjust enrichment cause of action as duplicative of the breach of contract claim.

Plaintiffs now move for summary judgment, arguing that FLM admitted to failing to comply with several sections of the AIA Agreement. Plaintiffs also argue that FLM should be estopped from claiming that the construction cost estimate was eight million dollars, as listed in the final invoice, because FLM previously provided a four million dollar estimate on the building permit application. In opposition, FLM argues that the Court's previous determination that there were issues of fact precluding summary judgement on defendant's motion is the law of the case and thus precludes summary judgment on plaintiffs' motion.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, plaintiffs have not made a *prima facie* showing of entitlement to summary judgment. Plaintiffs argue that Francis Fleetwood ("Fleetwood"), FLM's principal, admitted at his deposition that FLM breached §§ 2.2.2, 2.2.3, 2.2.4, 2.2.5, 2.3.1 and 2.3.2 of the AIA Agreement. Though plaintiffs attached portions of Fleetwood's deposition transcript to their motion, they failed to attach the pages where Fleetwood allegedly admitted to breaching §§ 2.2.2-2.2.4 and 2.3.2. Thus, the Court cannot evaluate the weight and sufficiency of these alleged admissions and plaintiffs' motion based on these admissions is denied. *See Cambridge Factors, Inc. v. Stagecoach Bus Systems, Inc.*, 155 A.D.2d 267, 268-69 (1st Dept. 1989).[1]

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[1]In any event, it is unclear whether these statements, as plaintiffs recite them in their motion, establish as a matter of law that FLM materially breached the AIA Agreement. According to plaintiffs, Fleetwood stated that §§ 2.2.3 and 2.2.4 do not apply to this type of project. Fleetwood further stated that he provided plaintiffs with the construction budget estimate, but did not understand the term "construction budget requirements" as the term is listed in § 2.2.2. Lastly, plaintiffs do not allege that Fleetwood admitted to failing to comply with § 2.3.2, which required FLM to update plaintiffs as to construction costs, but simply allege that FLM did not properly update the costs properly. Given the lack of clarity concerning FLM's

Moreover, though plaintiffs have attached the interrogatory responses and deposition transcript of FLM principal James McMullan ("McMullan") concerning FLM's alleged violation of §§ 2.2.5 and 2.3.1, these statements do not establish as a matter of law that FLM materially breached the AIA Agreement. To constitute a material breach, the breach must be "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract . . ." *Lasker-Goldman Corp. v. City of New York*, 221 A.D.2d 153, 153-54 (1st Dept. 1995).

Both the interrogatory responses and McMullan's testimony indicate that FLM may have substantially performed under §§ 2.2.5 and 2.3. FLM admitted in its interrogatory responses that it did not provide a preliminary cost estimate as required by § 2.2.5. However, Janice Burns attests that plaintiffs received informal cost estimates between six and eight million dollars. Similarly, McMullan admitted that FLM did not produce mechanical and electrical systems drawings as required by § 2.3.1, but he also testified that FLM produced structural drawings, thus satisfying a separate requirement under § 2.3.1. Accordingly, the interrogatory responses and deposition testimony do not establish as a matter of law that FLM materially breached the AIA Agreement. *See R.R. Chester, LLC v. Arlington Bldg. Corp.*, 22 A.D.3d 652, 654 (2d Dept. 2005); *Lasker-Goldman Corp*, 221 A.D.2d at153-54.[2]

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performance and obligations under the AIA Agreement, these statement would be insufficient to entitle plaintiffs to summary judgment.

[2]Because the Court holds that plaintiffs have failed to make a *prima facie* showing of entitlement to summary judgment, it does not address FLM's argument that the Court's February

Further, the Court will not invoke judicial estoppel to prevent FLM from asserting a construction cost estimate inconsistent with the four million dollar estimate FLM listed in the building permit application. The doctrine of judicial estoppel "prevent[s] a party from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding or a prior proceeding." *Shepardson v. Town of Schodack*, 195 A.D.2d 630, 632 (3d Dept. 1993).

Defendants base their calculation of unpaid fees on a construction cost estimate of eight million dollars. Plaintiffs argue that this figure contradicts defendants' previous representation on the building permit application. But the figure defendants presented on the building permit application was an estimate, not a statement as to actual cost. Thus, the Court does not find that allowing defendants to assert a higher estimate now would directly contradict their previous statements. *See Inter-Power of New York v. Niagara Mohawk Power Corp.*, 208 A.D.2d 1073, 1075 (3d Dept. 1994). Further, plaintiffs admit that prior to the permit application defendants provided them with verbal construction cost estimates between six and eight million dollars. Consequently, defendants' asserting an estimate of eight million dollars now would not be inequitable to plaintiffs.

Lastly, the Court will not dismiss FLM's counterclaim for $438,875.25 in unpaid fees. As stated above, there are triable issues of fact concerning FLM's obligations and level of performance under the AIA Agreement. Thus, a jury must resolve whether FLM

2011 order precludes summary judgment here.

is entitled to these fees.

In accordance with the foregoing, it is

ORDERED that the motion for summary judgment and other relief by plaintiffs Robert Burns and Janice Burns is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: New York, New York
March 13, 2012

ENTER:

Saliann Scarpulla, J.S.C.

FILED
MAR 16 2012
COUNTY CLERK'S OFFICE
NEW YORK