

Tricounty Constr. Corp. v Franklin Credit Mgt. Corp
2012 NY Slip Op 33646(U)
May 1, 2012
Sup Ct, Bronx County
Docket Number: 18942/2007
Judge: Lucindo Suarez
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5-4-12

PART 19

Case Disposed	<input checked="" type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

-----X
THE COUNTY CONSTRUCTION CORP.

Index No. 18942/2007

- against -

Hon. LUCINDO SUAREZ,

Justice.

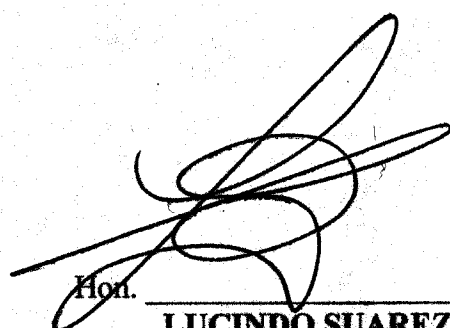
 **FRANKLIN CREDIT MGT. CORP., et ano**
-----X

The following papers numbered 1 to _____ read on this motion, _____
Noticed on _____ and duly submitted as No. _____ on the Motion Calendar of _____

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Sur-replying Affidavit and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon inquest conducted April 18, 2012, this action is disposed of in accordance with the annexed decision and order.

Dated: 05/01/2012



Hon.

LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

-----X

TRICOUNTY CONSTRUCTION CORP.,

Plaintiff,

- against -

FRANKLIN CREDIT MANAGEMENT CORP. and
THEODORE BRIGGS,

Defendants.

-----X

DECISION AND ORDER

Index No. 18942/2007

PRESENT: Hon. Lucindo Suarez

Upon inquest conducted April 18, 2012 (Maria Rivera, Senior Court Reporter) solely against defendant Theodore Briggs upon the striking of his answer, pursuant to the orders of the court (Hon. Laura G. Douglas, J.S.C.) dated November 10, 2011, February 24, 2012 and February 28, 2012; plaintiff's April 18, 2012 communication to the court; the April 20, 2012 order of the undersigned directing plaintiff to provide proof of fees and expenses paid to the public adjuster; plaintiff's April 25, 2012 response to such order; and due deliberation; the court finds:

Plaintiff contractor and defendant property owner Theodore Briggs entered into a contract for renovation of defendant's property, which had been damaged by fire. The May 17, 2006 contract stated that plaintiff would accept as full payment the proceeds of defendant's insurance policy less any fees and expenses paid to the public adjuster, and defendant assigned to plaintiff all payments made by the insurer, whether made solely to defendant or to defendant and a third party. The contract further stated that in the absence of a written agreement between the parties, defendant would be responsible for payment for any additional work performed that was not covered by

insurance. The complaint alleges that defendants¹ have received and retained insurance disbursements in the amount of two hundred forty thousand dollars (\$240,000.00).

At inquest, plaintiff's owner and president testified that plaintiff performed all work specified, together with extra work in the amount of sixty-one thousand eight hundred seventy dollars and ninety-one cents (\$61,870.91). Plaintiff received and deposited one payment from defendant in the amount of seventy thousand dollars (\$70,000.00). In support of the value of the insurance-covered work and its claim for damages, plaintiff submitted the December 4, 2006 letter from the insurer which listed the total replacement cost as the amount of two hundred seventy-five thousand nine hundred four dollars and thirty-three cents (\$275,904.33). Plaintiff claims to be entitled to this amount. It is to be remembered, however, that the contract was limited to insurance proceeds paid, minus any fees and expenses paid to the public adjuster, and as the complaint alleges the wrongful withholding of insurance proceeds, plaintiff cannot be damaged in amounts that the insurer has not yet disbursed which therefore cannot be wrongly held by defendants. "Proceeds" are generally defined as those funds which have been disbursed and received. *See e.g.* Black's Law Dictionary (9th ed 2009). If plaintiff believes that the insurer was wrongly withheld payment, plaintiff's recourse would be against the insurer.

The remainder of the letter is therefore relevant. Deducted from the total replacement value are the policy deductible in the amount of one thousand dollars (\$1,000.00) and recoverable depreciation in the amount of sixty-two thousand two hundred ninety-seven dollars and seventy-seven cents (\$62,297.77), for an "actual cash value owed" of two hundred twelve thousand six

¹ Co-defendant mortgagee Franklin Credit Management Corporation ("FCMC") is ostensibly the co-payee, if any, on the insurance disbursements. According to the County Clerk file, of which the court takes judicial notice, a November 9, 2009 order directed FCMC to deposit any funds received with the County Clerk. A March 11, 2010 order directed FCMC to deposit the amount of ninety-nine thousand three hundred forty dollars and thirty-nine cents (\$99,340.39) with the County Clerk and the City Finance Administration. It is not known whether, when or in what amount FCMC has done so.

hundred six dollars and fifty-eight cents (\$212,606.58). Most importantly, the letter establishes “previous payments” only in the amount of two hundred eleven thousand three hundred seventy-three dollars and eight cents (\$211,373.08).

However, plaintiff also submitted a subsequent check issued on June 15, 2007 by the insurer to the defendants in the amount of sixty-one thousand thirty-nine dollars and thirty-four cents (\$61,039.34). Accordingly, plaintiff has established the amount of payments wrongly withheld to be two hundred seventy-two thousand four hundred twelve dollars and forty-two cents (\$272,412.42). While plaintiff claims entitlement to a check in the amount of two thousand four hundred ninety-one dollars and ninety-one cents (\$2,491.91), this check was not issued to Briggs, either solely or jointly, and payment was therefore not assigned to plaintiff pursuant to the contract. Furthermore, the contract specifically exempts payments to the public adjuster from the amount due to plaintiff.

Given a valid contract between plaintiff and defendant, there can be no recovery in quasi-contract. *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 907 N.E.2d 268, 879 N.Y.S.2d 355 (2009), *rearg denied*, 12 N.Y.3d 889, 911 N.E.2d 855, 883 N.Y.S.2d 793 (2009).

Even in a defendant’s absence, a plaintiff must still prove his damages at inquest, *see Paulson v. Kotsilimbas*, 124 A.D.2d 513, 508 N.Y.S.2d 428 (1st Dep’t 1986), by evidence in appropriate and sufficient form, *see Premium Channels Pub. Co. v. Rolls-Royce Motors, Inc.*, 172 A.D.2d 160, 567 N.Y.S.2d 699 (1st Dep’t 1991); *Wine Antiques, Inc. v. St. Paul Fire & Marine Ins. Co.*, 40 A.D.2d 657, 336 N.Y.S.2d 550 (1st Dep’t 1972). Accordingly, if plaintiff believed additional funds had been disbursed, it should have presented such proof at inquest. Plaintiff is therefore entitled to damages in the amount of two hundred seventy-two thousand four hundred twelve dollars and forty-two cents (\$272,412.42) (the funds disbursed by the insurer and not turned

over to plaintiff) plus sixty-one thousand eight hundred seventy dollars and ninety-one cents (\$61,870.91) (the cost of the extra work performed for defendant), minus seventy thousand dollars (\$70,000.00) (defendant's payments to plaintiff).

To the extent that plaintiff seeks a declaration of its superior interest in the funds (if any) deposited by FCMC pursuant to order, such issue was not before the court on the inquest conducted solely against defendant Briggs, nor would FCMC have been on notice of same. Plaintiff was advised at inquest that such relief was beyond the scope of the inquest. Such relief, if at all, is more appropriately sought before the assigned I.A.S. Judge.

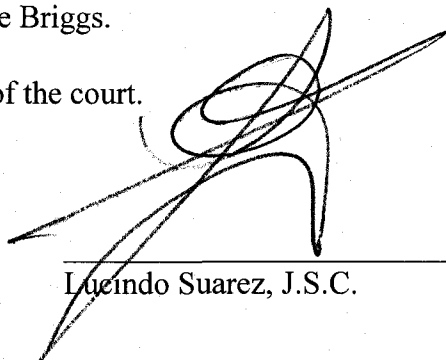
Accordingly, it is

ORDERED, that plaintiff is entitled to judgment in the amount of two hundred sixty-four thousand two hundred eighty-three dollars and thirty-three cents (\$264,283.33) in damages, together with costs and disbursements as taxed by the Clerk of the Court and interest from June 15, 2007; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in the amount of two hundred sixty-four thousand two hundred eighty-three dollars and thirty-three cents (\$264,283.33) in damages, together with costs and disbursements as taxed by the Clerk of the Court and interest from June 15, 2007, against defendant Theodore Briggs.

This constitutes the decision and order of the court.

Dated: May 1, 2012



Lucindo Suarez, J.S.C.