SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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SCIENTIFIC ELECTRIC COMPANY, INC., Index No. 118579/06

Plaintiff, **DECISION AND JUDGMENT**

-against-

ADG PARK CONSTRUCTION GROUP, LLC, a/k/a AMERICAN DEVELOPMENT GROUP, PARK SOUTH LOFTS, LLC, 43 PARK OWNERS GROUP, LLC, BOARD OF MANAGERS OF PARK SOUTH LOFTS CONDOMINIUM, NORTH FORK BANK, JOHN DOES "1" through "10" being intended to be those persons or entities with an interest in real property,

Defendants.

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BARBARA JAFFE, JSC:

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Plaintiff sues defendant ADG Park Construction Group, LLC (ADG) for breach of contract, defendants 43 Park Owner's Group (43 Park) and Park South Lofts, LLC (Park South) for unjust enrichment, and all defendants for foreclosure on a mechanic's lien. Defendants counterclaim for breach of contract and willful exaggeration of the mechanic's lien. On August 6, 7, 9, and 10, and September 4 and 6, 2012, a bench trial was held before the justice previously presiding in this Part. Plaintiff's witnesses Felix Rivera, Thomas E. Jocelyn, III, William Battle, Michael Adams Gary Griggs, and Earl Ingram were the sole witnesses. Before rendering a verdict, the previously presiding justice was appointed to the Appellate Division, and by emails

dated January 21, 2013, the parties consented to my rendering a verdict based on the trial transcript and evidence. Post-trial memoranda were submitted on April 15, 2013.

Based on the transcript of the proceeding, I render the following findings of fact and conclusions of law.

I. FACTS

A. The contract

On October 3, 2003, plaintiff contracted to perform electrical work in a gut-renovation project at 43-45 East 30th Street, New York, NY, premises then owned by 43 Park and sold in 2006 to Park South. (P's Exhs. 10, 12). The contract, drafted by ADG and edited by plaintiff, consists of four parts: Standard Form of Agreement Between Contractor and Subcontractor (Agreement), Rider to Construction Agreement (Rider), General Conditions of the Contract for Construction (General Conditions), and plaintiff's Proposal. (P's Exhs. 1A, 7).

In the proposal, the parties agree to the scope of plaintiff's work, including providing power for the microwave, electric washer and dryer, HVAC, wine cooler, refrigerator, sprinkler booster pump, the boiler, smoke detectors, and several other projects, along with wiring the internet, telephone, and television, all at a contract price of $220,000. (Proposal; Agreement, 10.2). The date for substantial completion is set for no later than March 30, 2004. (Agreement, 9.3).

The proposal permits plaintiff to apply for monthly progress payments by invoicing for the percentage of work completed using an AIA form. (*Id.*, 11.1-11.3; 11.6). The progress payments are calculated based on the percentage completed, less 10 percent "retainage." (Rider, 6[b][I]). The retainage, or money withheld pending the completion by the contractor, is to be

paid upon completion of the work. (*Id.*, 6[b][ii]; Agreement, 12).

The parties also agreed to memorialize in writing any changes to the contract, including the time within which to finish the project and orders for extra work, and that any changes require the approval by ADG, the owners, and the architect. (Agreement, 5; General Conditions 7).

Several remedies are set forth in the contract. In the event plaintiff fails to "carry out the Work in accordance with this agreement,"ADG must provide written notice of the defect, and if not corrected within three days, hire another subcontractor to do the work at plaintiff's expense. (Agreement, 3.4.1). The parties also agreed that "[i]n the event that [plaintiff's] work is not substantially complete by [March 30, 2004], due in whole or in part to the fault of [plaintiff], [plaintiff] shall pay to Contractor as liquidated damages, and not as a penalty the sum of $500.00 per day . . ." (Rider, 26). Liquidated damages are limited, however, to "the extent caused by [plaintiff], and in no case for delays or causes arising outside the scope of this contract." (Agreement, 3.3.1).

B. The construction project

1. Work at the site

On July 3, 2003, Thomas E. Jocelyn, III, plaintiff's owner, obtained an electrical permit from the City of New York in order to commence work pursuant to the contract. There was no general contractor, however, or anyone else, to coordinate the work site and the various subcontractors. Rather, the project leader, Perry Finkelman of ADG and 43 Park was rarely at the site. Tommy Farrell, a carpenter foreman, acted as manager, but only for the last month or two, and ADG employee Gary Griggs supervised the project sometime later. (Tr. 116, 329.)

There was also no construction schedule, and all communications were verbal. Coordination meetings were not well attended and meeting minutes were not distributed. The lack of coordination slowed the work. Ducts, usually installed first, were installed last, which presented additional difficulties. (Tr. 134, 162, 332).

There were, however, enough employees to perform the work on schedule: 15 employees were on staff over the three-year project, and he sent his best foreman to the site, although it was impossible to have someone on site every day because of changes in the work and other delays. (Tr. 158, 164). Some weeks passed without any work being performed, and on one occasion, the walls were not finished, which caused additional delay. (Tr. 164, 325).

ADG asked plaintiff to perform extra work. For example, before prospective buyers were shown through the building, ADG wanted the apartments modified in order to entice a sale by moving light switches, doors, and walls. (Tr. 109). A separate subcontractor was responsible for the intercom, but plaintiff was asked to run the intercom wire. (Tr. 124-125). A swimming pool was added to the roof, the layout of several bathrooms was changed which required the moving of fixtures, and a special wire was needed to install the fire pump. (Tr. 114, 221). No retainage was claimed for this extra work and the architectural drawings were not revised when the plans changed. Nor were there written change work orders or approvals.

Although Gary Griggs, ADG's senior vice president, acknowledged that plaintiff was asked to do extra work, he was unable to explain the approval process. (Tr. 361-64). Due to plaintiff's failure to staff the project adequately, additional electricians were hired in August 2005. (Tr. 458). Some of plaintiff's work was defective or incomplete, as Griggs recounted that plaintiff had installed the wrong intercom wire and that the system still has problems with static.

(Tr. 457). Plaintiff damaged range hoods which required additional work to give them a clean, finished appearance. (Tr. 452).

2. The invoices

As of March 23, 2004, plaintiff invoiced $132,000 for work under the contract. As of May 23, 2005, $194,000, and as of October 10, 2006, the full amount, $220,000. Changes in the contracted work are appear on the invoices, such as adding wiring to the gym area, moving outlets, installing range hoods, wiring the sprinkler system, and adding the pool. Plaintiff invoiced a total of $158,553.92 for extra work, and was paid $310,748.92 for both the contract work and extra work. (P's Exh. 2).

The summary sheet listing the amounts invoiced and paid is divided into three sections: the work originally contracted for, the extra work, and the sprinkler system, which was also extra. (P's Exh. 8). ADG's payments are applied to the invoices listed on the different sections of the summary sheet, showing how much was paid for the original work, the sprinkler, and the extra work, although the payments do not match the invoices and Jocelyn could not explain the discrepancies. For example, check 7864 is applied to invoices in the extra work section and also to the original work section.

Plaintiff did not offer in evidence a complete, original set of the invoices. Nor did it offer the AIA forms, even though the contract requires that it submit them with the invoices. Several invoices reference job tickets that detail extra work requested but many job tickets are missing. To make matters worse, the original file for the project was accidentally shredded by plaintiff's bookkeeper, and the copy of it, which had been sent to plaintiff's attorney, was also not offered as evidence. Plaintiff instead offered invoices produced by defendants, which the trial court

admitted with the proviso that he would "certainly consider charging [himself] as to the adverse inference of non-production of the folder." (Tr. 88-89).

The invoices admitted reflect several discrepancies. Retainage is withheld on only some of the invoices. (Tr. 178-80, 183, 192). Invoice 24284 covers unidentified extra work which Jocelyn could not specify absent the job ticket. (Tr. 108). Jocelyn also could not explain invoice 24405 because all five job tickets are missing, and he was unsure as to whether the work reflected on that invoice was completed. (Tr. 296). Invoice 24529, for adding a gym to the building, reflects that only 80 percent of the amount invoiced was approved; Jocelyn could not explain it. (Tr. 227). Griggs confirmed that the work was only 80 percent complete. (Tr. 441).

Invoice 24606, for $10,040, reflects that only $6,000 of it was approved. ADG never agreed to pay the full amount. (Tr. 442). Invoice 25004, for additional lighting and other parts in the penthouse, reflects that only 80 percent of the work was approved. Jocelyn was unable to explain why the full amount was not approved and admitted that most of the work labeled extra on this invoice may have been within the scope of the contract. (Tr. 236-37). Invoice 24796 included sales tax, which Jocelyn admitted was an error. Invoice 25018 was for the sprinkler system, payment for which was never approved. (Tr. 447).

Although the contract price is $220,000, on invoice 24657, the contract price is shown as $208,000, the result of Jocelyn's agreement to reduce the price in exchange for extra work. (Tr. 190-91). According to Griggs, plaintiff never installed the additional monitoring equipment. (Tr. 437-38). Invoice 25007 is for one year of monitoring, and it reflects a payment of $12,000. Griggs testified that this invoice should never have been paid.

3. Contractor's application for payment

Finkelman signed ADG's applications for payment on behalf of ADG. (Tr. 376). On the applications are line items reflecting the percentage finished for each contractor's work, not including extra work. (Tr. 380-86, 426). As of July 20, 2005, the electrical work is reported as 99 percent complete. (Tr. 416).

4. ADG terminates plaintiff

In 2006, the relationship between plaintiff and ADG deteriorated. For example, plaintiff and ADG disagreed as to how to finish the fire alarm system before inspection. (D's Exh. A, A-1). Similarly, ADG Park claimed that a boiler sail switch was not installed, whereas plaintiff claimed it was. (*Id.*). The building passed the electrical inspection on June 7, 2006. (P's Exh. 6). By letter dated October 6, 2006, ADG terminated plaintiff. (P's Exh. 5).

After plaintiff's termination, ADG hired other electricians who installed light fixtures, wired an HVAC unit, and worked on the fire alarm system. (Tr. 459-61; D's Exh. D).

II. CONTENTIONS

A. Plaintiff's contentions

Plaintiff argues that the evidence establishes that it finished all of the work required under the contract with ADG, that the work was neither unfinished nor defective, that it was only paid $198,000 of the $220,000 contract price, that it performed $130,053.92 in extra work pursuant to verbal agreements with ADG, and that it was only paid $97,748.92 for the extra work. It relies on the verbal agreement to install a sprinkler alarm for $28,500, of which it alleges to have been paid $15,000. It also maintains that the evidence demonstrates that it was not responsible for the delay in completion and that, rather, the cause of delay was disorganization and poor

management. In total, plaintiff seeks from ADG $67,805, plus statutory interest from July 10, 2006, and the same amount from Park South and 43 Park, whom it claims were proven to have been unjustly enriched by its work. Pursuant to its mechanic's lien, plaintiff maintains that it is entitled to judgment against all defendants for the lien amount. It alleges that defendants' counterclaims were dismissed by the justice hearing the trial when defendants rested without calling any witnesses.

B. Defendants' contentions

Defendants argue that the evidence establishes that as the contract was complete and unambiguous, any extra work, modifications, and time extensions not evidenced by a writing cannot be compensated. They claim entitlement to an offset for the work that it proved was performed by other electricians after plaintiff's termination. They rely on evidence that plaintiff verbally reduced the contract price to $208,000, and maintain that plaintiff failed to prove its unjust enrichment claims, and cannot foreclose on the mechanic's lien, because all sums owed the general contractor were paid. Defendants also argue that plaintiff is not entitled to a blanket lien over four units in the building, and deny that the trial court dismissed its counterclaims.

Defendants also assert that they successfully proved their entitlement to $650,000 in liquidated damages due to plaintiff's failure to finish before March 30, 2004, and that plaintiff is liable for unspecified damages under Lien Law § 39-a for willfully exaggerating the lien amount.

III. ANALYSIS

At a bench trial, the "plaintiff has the burden of proving his case by a fair preponderance of the credible evidence." (*Rinaldi & Sons v Wells Fargo Alarm Serv.*, 39 NY2d 191, 196 [1976]; *see also Michaels v Agricultural Ins. Co.*, 38 NY2d 793, 794 [1975]). Accordingly, plaintiff

here bears the burden of proof, except as to defendants' affirmative defenses and counterclaims. (*see* CPLR 3018 [b], 3211[a][5]).

A. The scope of the contract

"The best evidence of what parties to a written agreement intend is what they say in their writing." (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Consequently, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." (*Id.*, 98 NY2d 569; *W.W.W. Assoc., Inc. v. Giancontieri*, 77 NY2d 157, 162 [1990]). "[W]here a contract has a provision which explicitly prohibits oral modification, such clause is afforded great deference." (*Healy v Williams*, 30 AD3d 466, 467 [2d Dept 2006]; *see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]; *Tierney v Capricorn Investors, L.P.*, 189 AD2d 629, 631 [1st Dept 1993]; *see also* General Obligations Law § 15–301[1]).

Here, the parties' contract contains a clause requiring that all modifications be in writing. Under certain circumstances, however, such a general merger clause does not preclude oral modifications. (*Stendig, Inc. v Thom Rock Realty Co.*, 163 A.D2d 46, 49 [1st Dept 1990]; *see Rose*, 42 NY2d 343). An oral modification may be enforced if there is partial performance by one of the parties that is "unequivocally referable to the oral modification." (*Rose*, 42 NY2d 343; *see Healy*, 30 AD3d 467–68; *F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80 [1st Dept 2000]). An oral modification must be supported by unequivocal evidence of mutual assent to the terms of the modification. (*F. Garofalo Elec.*, 270 AD2d 76).

Here, plaintiff proved that pursuant to piecemeal verbal agreements, it performed work beyond the scope of the contract and that ADG paid it more than the contract price. No evidence

was offered, however, as to the terms on which they agreed, or as to the specific work performed pursuant to each agreement.

Plaintiff have also failed to prove the agreed-upon price. Rather, the evidence shows that defendants only approved partial payments for many of the change orders and plaintiff offered no explanation of the discrepancies. Consequently, plaintiff has failed to prove, unequivocally, the additional work requested by ADG and how much it agreed to pay. (*See also Metropolitan Steel Indus., Inc. v Perini Corp.*, 36 AD3d 568, 569 [1st Dept 2007] [change order estimates insufficient to establish value of plaintiff's extra work not covered by contract]).

Defendants claim that plaintiff agreed orally to modify the original contract price from $220,000 to $208,000 in exchange for monitoring the fire alarm system, but it is undisputed that the project was abandoned. And although plaintiff marked the invoice for the fire alarm system monitoring as paid, no persuasive evidence was offered that ADG sent plaintiff intended to pay that invoice rather than for completed work. Therefore, absent evidence of partial performance of monitoring the fire alarm system, this oral modification cannot be enforced.

B. Alleged breach by defendants

If a subcontractor substantially performs pursuant to a contract it is entitled to recover the contract price, less the costs of replacing defective work or completing the project. (*Garofalo*, 270 AD2d 76). Here, the preponderance of the evidence shows that work within the scope of the original contract was substantially complete, at the latest, by July 20, 2005, and the application for payment indicates that by that time, the electrical work was 99 percent complete. And, as of May 23, 2005, plaintiff had invoiced ADG for $194,000, approximately 88 percent of the full $220,000 contract price. Moreover, Griggs admitted that the project was substantially complete

in mid-2005, when they received the temporary certificate of occupancy. (*845 Unlimited Partnership v Flour City Architectural Metals, Inc.*, 28 AD3d 271 [1st Dept 2006] [limiting plaintiff's recovery to specific damages because 99.5 percent completion is substantial performance]; *Michael G. Buck & Son Constr. Corp. v Poncell Constr. Co.*, 217 AD2d 925, 926 [4th Dept 1995] [95 percent completion of work under a construction contract is substantial performance]). Plaintiff, therefore, is entitled to payment of the full contract price.

Plaintiff must also prove its damages. (*Metropolitan*, 36 AD3d 568; *Manshul Constr. Corp. v Dormitory Auth. of State of N.Y.*, 79 AD2d 383, 388 [1st Dept 1981]). Therefore, if a plaintiff performs work pursuant to a contract, and work is added later, the plaintiff must delineate between payments for work under the original contract, and payments for extra work. (*Ludeman Elec., Inc. v Dickran*, 74 AD3d 1155, 1156 [2d Dept 2010] [plaintiff cannot recover for extra work absent evidence as to work performed pursuant to base contract and what work was extra]; *Neptune Estates, LLC v Big Poll & Son Constr., LLC*, 39 Misc 3d 649 [Sup Ct, Kings County 2013] [damages not proven as plaintiff failed to prove that payments were for extra construction work, rather than work under original contract]).

The contract price was $220,000 and plaintiff was paid $310,748.92. Jocelyn admitted, however, that the amounts invoiced do not match the amounts received, the 10 percent retainage was withheld on some invoices and not on others, and the summary sheets are unreliable. Moreover, AIA payment forms reflecting the actual retainage amounts were not admitted in evidence and without them it cannot be determined if, and when, retainage was withheld.

There is also no evidence demonstrating how plaintiff knew certain payments were for work within the scope of the original contract and other payments were for additional work. For

example, the last check, number 7864, was credited to both original and extra work, including $12,000 for fire alarm monitoring that was undisputably abandoned, and there is no testimony explaining why plaintiff decided that the $12,000 constituted payment for the abandoned fire alarm monitoring rather than payment for work under the original contract. Plaintiff also admitted that $11,000 was invoiced for extra work when it might have been within the scope of the original contract. Plaintiff's bookkeeper, who tracked these payments, did not appear at trial, permitting me to infer that he or she would not have supported plaintiff's position.

For these reasons and although plaintiff demonstrated that it was paid more than the contract price, it has failed to prove, by a preponderance of the credible evidence, which payments were for extra work and which were for original work. Consequently, plaintiff has not proven damages.

Defendants too have failed to prove that any of the work performed by other contractors after plaintiff's termination was to repair or complete work under the original contract, which would reduce the amount to which plaintiff is entitled under the contract. (*Garofalo*, 270 AD2d 76). And they only claim entitlement to an offset, and do not argue that plaintiff breached the contract by performing incomplete or defective work. Plaintiff continued to do extra work at the site for a year after substantial completion of the original work. Although Griggs testified that the electricians were brought in after plaintiff corrected and finished extra work, he never stated that they fixed work covered by the original contract. As the terms governing extra work are uncertain, defendants cannot now seek a contractual remedy for breach of the oral modification, or breach of a contract they argue never existed.

Moreover, the contract requires written notice if another contractor is hired to correct

plaintiff's work, and no evidence was offered that written notice was given. Therefore, defendants have not established that they are entitled to a set-off or credit.

C. Breach by plaintiff

Defendants allege in their counterclaim that plaintiff breached the contract by not substantially completing its work by March 30, 2004. Liquidated damages clauses providing that a contractor must pay a fixed price per day if work is not finished by a specific time are enforceable unless the contractor proves that the stipulated amount is unreasonable and thus unenforceable as a penalty. (*Plato Gen. Constr. Corp. v Dormitory Auth. of N.Y.*, 89 AD3d 819, 821-23 [2d Dept 2011]; *Hunts Point Multi-Service Ctr., Inc. v Terra Firma Constr. Mgt. & Gen. Contr., LLC*, 5 AD3d 183, 183-85 [1st Dept 2004]).

Here, plaintiff submits no evidence that the liquidated damages clause in the contract was unreasonable. Pursuant to the clause, however, the damages must be attributable "in whole or in part to the fault of [plaintiff]" and are limited to "the extent caused by [plaintiff]." Here, having chosen to rest after plaintiff's case, defendants rely solely on plaintiff's case, which provides no clear evidentiary basis for finding that plaintiff is responsible for the delay in substantial completion to July 2005. (*See e.g.*, *Plato*, 89 AD3d 821-23 [record showed that 33 percent of delay was contractor's fault]). Defendants, thus have not proven by a preponderance of the credible evidence that the delays were caused by plaintiff.

Plaintiff's assertion that the prior presiding justice dismissed defendants' counterclaims is inaccurate.

D. Unjust enrichment

A subcontractor cannot sustain a cause of action for unjust enrichment against a property

owner with whom it has not contracted, absent an agreement to pay the general contractor's debt or circumstances giving rise to such an obligation. (*IMS Engineers-Architects, P.C., v State of N.Y.*, 51 AD3d 1355 [3d Dept 2008]; *Mariacher Contracting Co. v Kirst Constr., Inc.*, 187 AD2d 986 [4th Dept 1992]; *Metropolitan Elec. Mfg. Co. v Herbert Constr. Co.*, 183 AD2d 758 [2d Dept.1992]). The rationale behind this rule is that any services performed by the subcontractor pursuant to its contract with the general contractor were done "for the benefit of the general contractor . . . , not for the benefit of the owner." (*Sybelle Carpet & Linoleum v E. End Collaborative*, 167 A.D2d 535 [2d Dept 1990], *quoting Schuler-Haas Elec. Corp. v Wager Constr. Corp.*, 57 AD2d 707, 708 [4th Dept 1977]). "[T]he subcontractor should not be allowed to perform an end-run around the bargained-for contractual structure by seeking relief directly from the landowner, with whom he has not bargained." (*US E. Telecom., Inc. v US W. Communications Serv., Inc.*, 38 F3d 1289, 1297 [2d Cir 1994]).

Here, no evidence was offered that Park South and 43 Park ever agreed to pay ADG's debts, or that they otherwise contracted with plaintiff. In addition, plaintiff has failed to prove that it performed work for which it was not paid. Consequently, plaintiff has not proven its unjust enrichment claims.

E. Mechanic's lien

To foreclose on a mechanic's lien successfully, the lien holder must prove that it was not paid for completed work on the property. (*Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616 [1st Dept 2012]; *see also* Lien Law § 24). Here, plaintiff has not proven that it is owed money for its work.

F. Willful exaggeration of the mechanic's lien

A lien is void, and a lienor liable, if the lien amount was willfully exaggerated. (Lien Law §§ 39, 39-a). "Inaccuracy in amount of lien, if no exaggeration is intended, does not void a mechanic's lien; willfulness also must be shown." (*Goodman v Del-Sa-Co Foods, Inc.*, 15 NY2d 191, 195 [1965]; *see also George A. Fuller Co. v. Kensington-Johnson Corp.*, 234 AD2d 265, 267 [2d Dept. 1996] [finding that "the owner failed to meet its burden of proving that the amounts set forth by the general contractor in its lien were intentionally and deliberately exaggerated."]). While plaintiff did not prove damages, there is no evidence that it willfully exaggerated the lien amount. Defendants, therefore, have not proven that plaintiff is liable for damages under Lien Law § 39-a.

VI. CONCLUSION

Accordingly, it is hereby

ADJUDGED, that plaintiff's claims for unjust enrichment, breach of contract, and to foreclosure the mechanic's lien are not supported by the preponderance of the evidence; it is further

ADJUDGED, that plaintiff's mechanic's lien is discharged; it is further

ADJUDGED, that defendant's claims for breach of contract and lien exaggeration are not supported by the preponderance of the evidence; and it is

ORDERED, that the complaint and counterclaims are dismissed and that the Clerk is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC

DATED: June 13, 2013
New York, New York