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INDEX NO.: 8353-07

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

HELMAR CONSTRUCTION,

Plaintiff,

-against-

1198934 ONTARIO, INC., d/b/a BASIC STRUCTURE ENGINEERING GLAZING CONTRACTORS, ED ULRICH and JOHN CALIXTO,

Defendants.

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DECISION AFTER TRIAL

This matter involves a dispute between the plaintiff, Helmar Construction, Inc. (the "plaintiff" or "Helmar"), and the defendants 1198934 Ontario, Inc., d/b/a Basic Structure Engineering Glazing Contractors ("Basic"), and Ed Ulrich, the sole owner of Basic, in connection with the construction of a project known as the Queens Ambulatory Pavilion (the "Project").[1] More specifically, the plaintiff bid on and entered into a subcontract with Calcedo Construction, Inc. ("Calcedo"), the general contractor on the Project, to provide aluminum curtain-wall and related installations. In connection therewith, the plaintiff entered into a contract with Basic whereby the plaintiff agreed to purchase, and Basic agreed to supply, material necessary to fulfill the plaintiff's subcontract with Calcedo, which included, among other items, aluminum curtain-wall, glazing, aluminum windows, aluminum storefronts and entrances, hardware, and canopy glazing. The plaintiff alleges that Basic was also required to supply shop drawings and calculations, complete field measurements, and conduct certain testing of the materials that it

[1] The court hereby grants the plaintiff's request to conform the pleadings to the proof with respect to the proper name of the corporate defendant. Further, as noted in the record, the plaintiff has discontinued the action insofar as it is asserted against the defendant John Calixto, who was merely an employee of Basic.

supplied. While the parties agree that they entered into a subcontract, there is a sharp disagreement as to how the subcontract was memorialized and, consequently, whether certain key provisions were included therein. Also, the parties disagree as to whether Basic adequately performed its obligations to supply materials.

The plaintiff alleges and the record reflects that, in the fall of 2004, it entered into a contract with Calcedo to supply and to install curtain-wall for the Project. Such contract was introduced into evidence as plaintiff's Exhibit 1 (the "Calcedo Contract" or the "Contract"). The plaintiff alleges that it distributed the Calcedo Contract to potential suppliers of curtain-wall, including Basic, as part of the plaintiff's effort to solicit bids for material necessary to fulfill its obligations under the Contract. The plaintiff alleges that it received a written proposal from Basic, which it accepted. The plaintiff further alleges that it delivered to Basic a signed purchase order dated December 21, 2004, which was introduced into evidence as plaintiff's Exhibit 2 (the "Purchase Order"). The plaintiff claims that attached to the Purchase Order was a Rider entitled "Terms and Conditions" (the "Rider"), which contained several key provisions relied on by the plaintiff to support its claims against the defendants. Those provisions included, without limitation, terms of payment, attorneys fees, and the manner in which modifications to the agreement between the plaintiff and Basic were to be documented and memorialized. The defendants acknowledge and agree that they accepted the terms of the Purchase Order, but they claim that they never received or agreed to the Rider. The parties agree that the Rider contains no signature by Basic.

The plaintiff commenced this litigation in March of 2007. In its complaint, the plaintiff set out four causes of action, but narrowed its focus at trial to the first cause of action for breach of contract. The plaintiff alleged that Basic breached its contractual obligations by delivering non-conforming goods, by delivering defective goods, by failing to correct defective work, by failing to deliver goods in a timely manner, by failing to respond to the plaintiff's requests or to communicate with the plaintiff for significant periods of time, and by failing to complete its work as set forth in the Purchase Order. In its answer, Basic denied these allegations and raised a series of affirmative defenses.

The court presided over a lengthy trial at which the plaintiff produced its principal, Harold Basil, who testified for several days and produced numerous documents to support the plaintiff's claims. Mr. Basil testified that, from the beginning, Basic failed to deliver material as and when needed and that the material that was delivered did not meet specifications. Mr. Basil further testified that Mr. Ulrich refused to respond to repeated written requests from the plaintiff. The plaintiff also produced Joseph C. Tomei, the president of Calcedo, who acknowledged many of the problems detailed by Mr. Basil and recounted Calcedo's efforts to remedy such problems, including advancing payments and mailing payments directly to Basic's suppliers. Basic called Edward Ulrich, the president/owner of Basic, and Virginia Hardman, a bookkeeper for Calcedo. In his testimony, Mr. Ulrich agreed that he encountered great difficulty in supplying the curtain wall, but he blamed most of these problems on what he believed was a failure to be paid in full for each shipment.

The record reveals that the Project was to be constructed in stages beginning with the foundation work, followed by the structure and skin, and ending with the internal construction and finishing. Each phase needed to be completed before work on the next phase could begin. Moreover, the Project was large and complex and, in some respects, time-sensitive. Work was overseen by general contractors for each discipline, who were dependent on their subcontractors to complete the tasks assigned to them. Likewise, the subcontractors looked to their suppliers to produce materials that conformed to the needed specifications in a timely manner.

The court notes that, with projects of this magnitude and complexity, there undoubtedly are delays, difficulties, defective workmanship, or other similar impediments to completion. The expectation of the parties is that they will be kept to a minimum or that, when such events occur, they will be dealt with promptly and in a business-like manner. However, there comes a point when the sheer number of these negative events and the frequency of their occurrence move beyond that which can be expected and/or tolerated. When problems occur, it is incumbent upon the parties to the contract to communicate and to make a good-faith effort to resolve their differences and to address the problems. Although there is no guarantee that a solution to every problem will be found, the parties to the contract must make some attempt to respond. This means that, during the progress of the job, the contracting parties must be in regular contact with each other. When a communication is sent requesting a response, the other party has an obligation to respond. While the failure to provide a response, either favorable or unfavorable, may not constitute a breach of any express provision of the contract, the court finds that it constitutes a breach of the covenant of good faith and fair dealing.

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance (**Dalton v Educational Testing Serv.,** 87 NY2d 384, 398). The implied covenant of good faith and fair dealing encompasses any promises that a reasonable person in the position of the promisee would be justified in understanding were included in the agreement and prohibits either party from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract (**1-10 Industry Assocs., LLC v Trim Corporation of America,** 297 AD2d 630, 631). The implied covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that is not expressly forbidden by any contractual provision, but deprives the other party of the right to receive benefits under their agreement (**Aventine Investment Mgt. v Canadian Imperial Bank of Commerce,** 265 AD2d 513, 514).

The record reflects that problems arose from the Project's inception. As previously noted, those problems consisted of a failure to perform contractual requirements; delays in the delivery of materials needed to continue with installation work; and the delivery of damaged, defective, incomplete, or non-conforming materials. The plaintiff claimed that, from the outset, Basic failed to deliver items needed to begin or to continue the work of installing the curtain-walls. In fact, the plaintiff introduced correspondence demonstrating that, as early as the beginning of 2005, it was making repeated written requests for Basic to perform its contractual obligations. The plaintiff produced testimony that, despite repeated telephone calls, letters and faxes, delays continued. In addition, plaintiff produced testimony and correspondence that, when materials were supplied, they were incorrect, damaged, or defective. The plaintiff's principal, Harold Basil, testified that he repeatedly reached out to Basic to get it to address these problems, but in most cases his requests were ignored or went unanswered. The plaintiff introduced into evidence copies of correspondence and memoranda that documented the ongoing problems. Harold Basil also testified that he sought and received help from the general contractor, Calcedo, to rectify the problems with Basic's performance. Despite promises, agreements, and compromises reached with Basic, the situation was never fixed, which caused the plaintiff to sustain damages in the form of out-of-pocket charges and hold-backs from Calcedo. In support thereof, the plaintiff introduced into evidence numerous change orders.

Basic acknowledged that there were problems with the Project, but denied that it is liable for contractual damages. Basic denied that it supplied defective materials and that it failed to perform its contractual duties. Additionally, Basic disputed the plaintiff's right to withhold a 10% retainage from required progress payments, which the plaintiff acknowledged that it did. Basic contended that, as a result, it owed money to its suppliers and that any delays were the result of its inability to receive the funds needed to obtain materials and to complete the project.

The record clearly reflects that, on numerous occasions, Basic failed to respond to communications sent by the plaintiff requesting missing items or requesting that defective materials be replaced. Oftentimes, multiple requests had to be sent before any response was received. The record also reflects that Basic did not perform all of the tasks required by the contract and that it consistently and repeatedly delivered non-conforming or defective goods. Even if the court credits Basic's argument that the plaintiff inappropriately withheld a 10% retainage from its progress payments, Basic's failures went well beyond those that could be attributed to a lack of funds. Accordingly, the court finds that the plaintiff has established by a preponderance of the credible evidence that Basic breached its contractual obligations, which included the implied covenant of good faith and fair dealing.

Turning to the question of damages, the court notes that the plaintiff attempted to chronicle, record, and calculate every event that it deemed to be a breach of the Purchase Order. In fact, the plaintiff introduced 33 invoices that it claimed represented compensable damages. The plaintiff included in its calculation even those events that were minor, routine, or could have been expected on a project of this magnitude. In addition, in each instance, the plaintiff included its overhead and profit. The court has carefully reviewed each calculation and finds that not all of the plaintiff's invoices are compensable. Moreover, the court declines to award the amounts included in each invoice for overhead and profit. The court has reviewed the documentary evidence and the testimony of the witnesses and has made its own calculation based on those amounts that the court finds appropriately represent damages stemming from the defendant Basic's breach of contract. Accordingly, the court finds that the plaintiff is entitled to recover damages from Basic in the amount of $142,646.00, with interest from the date of the complaint.

The general rule regarding attorney's fees under New York law is that the prevailing party may not collect them from the loser unless such an award is authorized by an agreement between the parties or by a statute or court rule (**Glenn v Hoteltron Sup.,** 74 NY2d 386, 393). In support of its claim for attorney's fees, the plaintiff relies on language in the Rider. As previously noted, Basic denies that it ever received the Rider or that it agreed to its Terms and Conditions. Although the Rider was set up for Basic's signature and the plaintiff produced testimony that it delivered the Rider to Basic for signature, a copy signed by Basic was never introduced into evidence at trial. In fact, the only signature that appears on the Rider is that of Harold Basil on behalf of the plaintiff. The court finds that, under these circumstances, the record contains insufficient evidence to conclude that the Rider was, in fact, accepted by Basic. Accordingly, the court declines to award attorney's fees to the plaintiff.

Finally, the record does not reflect that the defendant Ed Ulrich agreed to guarantee payment or to be otherwise personally liable for Basic's failure to perform. The copy of the Purchase Order that was introduced into evidence at trial was not signed by Ulrich in either his personal or corporate capacity. Moreover, the record does not reflect that Ulrich abused the privilege of conducting business in the corporate form so as to warrant piercing Basic's corporate veil (*see*, **Worthy v New York City Housing Auth.**, 21 AD3d 284, 287-288). In fact, the plaintiff, in its post-trial memorandum, has acknowledged that it intends to commence additional litigation aimed at piercing the corporate veil in an attempt to hold Mr. Ulrich personally liable. Moreover, while the plaintiff contends that Ulrich fraudulently transferred funds from Basic to himself or to a successor corporation, the plaintiff acknowledges that any recovery of those funds should properly be part of its collection efforts. Accordingly, the court finds that the plaintiff has failed to establish, prima facie, that Ulrich is personally liable for Basic's breach of the Purchase Order, and the action is dismissed insofar as it is asserted against him.

DATED: **June 9, 2014**

HON. ELIZABETH HAZLITT EMERSON

J. S.C.