

Phoenix Constr., Inc. v 70th Street Apts. Corp.

2014 NY Slip Op 32580(U)

October 7, 2014

Supreme Court, New York County

Docket Number: 103223/09

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 58

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 PHOENIX CONSTRUCTION, INC.,

Plaintiff,

-against-

Index No.
 103223/09

70TH STREET APARTMENTS CORP., HSBC BANK,
 and NEW YORK CITY DEPARTMENT OF HOUSING
 PRESERVATION AND DEVELOPMENT,

Defendants,

-----X
 DONNA MILLS, J. :

Defendant 70th Street Apartments Corp. (70th Street) moves for summary judgment on its counterclaim. Plaintiff cross-moves for summary judgment.

Plaintiff commences this action, alleging breach of contract and seeking the foreclosure of its mechanic's lien. Plaintiff is a construction company which was contracted to provide services for 70th Street, a co-operative corporation. Specifically, plaintiff was hired to perform roofing and facade construction on the premises located at 225 West 70th Street, New York, New York. Plaintiff alleges that it completed its work and has not been fully compensated by 70th Street. Subsequently, plaintiff filed a mechanic's lien against the premises in the amount of \$46,285.35.

Plaintiff brought this action against 70th Street, as well as defendants HSBC Bank and the New York City Department of Housing Preservation and Development. The defendants other than 70th Street have been dismissed via stipulations of discontinuance. 70th Street has served and filed a counterclaim alleging that it is entitled to a judgment against plaintiff in the amount of \$45,500.00 pursuant to a penalty provision in article 20 in the rider to its contract with plaintiff.

70th Street moves for summary judgment on its counterclaim, arguing that there are no issues of fact in dispute. 70th Street submits a copy of the contract, an American Institute of Architects (AIA) agreement. The penalty provision in the rider, Article 20, provides that:

“Project must be completed within four calendar months (120 days) of the start date. If the work is not fully completed within that period, then a penalty equaling Two Hundred Fifty Dollars (\$250.00) per calendar day will be imposed upon the contractor by the owner until final completion is attained.”

70th Street states that the project began on July 19, 2007, but was not completed until May 21, 2008. According to 70th Street, this is 302 calendar days over the 120-day period. The contract provided that the designated architect, Accardo Engineering Co. (Accardo) was to certify plaintiff's work, as well as all payments made to plaintiff. Accardo was also authorized to resolve any disputes between the parties. (articles 9.4, 9.7 and 9.10.1 of the contract).

70th Street submits a determination from Accardo, dated July 14, 2008, which asserts that plaintiff was subject to a penalty of \$45,500, based upon the terms of the contract and the rider. In addition, 70th Street provides a series of “payment certificates and lien waivers” signed and notarized by plaintiff's president, dated November 2, 2007, January 11, 2008, April 2, 2008 and June 10, 2008. The last document contains the heading “Final payment certificate & release of lien.”

70th Street contends that if plaintiff anticipated possible delays, due, for example, to inclement weather, it was compelled to seek change orders. Article 13.3 of the contract provides that any delay due to “abnormal adverse weather conditions not reasonably anticipatable ” must be extended by change orders approved by Accardo. According to 70th Street, plaintiff never sought a similar change order approval which would have allowed an extension of the deadline.

70th Street seeks summary judgment on the counterclaim on the grounds that plaintiff's 302-calendar day delay is without justification; a final lien waiver was signed by plaintiff, which releases 70th Street from plaintiff's claim; and that the amount sought in the counterclaim effectively offsets the mechanic's lien of \$46,285.35.

Plaintiff opposes the motion and cross-moves for summary judgment. Plaintiff argues that the lien waivers submitted by 70th Street are not applicable, on the ground that there is no proof that plaintiff received payments from 70th Street.

Plaintiff argues that the penalty provision in the rider is unenforceable on public policy grounds. The exception to this rule, according to plaintiff, is proof of exceptional or anticipated damages to 70th Street which can be attributable to plaintiff. Plaintiff contends that 70th Street has failed to demonstrate such damages due to plaintiff's delay in the project. Plaintiff claims that the amount of compensation sought by 70th Street is grossly disproportionate to whatever actual damages 70th Street may have sustained.

Plaintiff also claims that delays in the construction were attributable to 70th Street as a result of the unanticipated discovery of asbestos on the premises in the course of plaintiff's performance and the resulting work to remove the asbestos.

Plaintiff seeks summary judgment on its breach of contract claim, stating that the mechanic's lien is legitimate in light of 70th Street's alleged failure to pay plaintiff the full cost of plaintiff's labors. Plaintiff avers that there is no dispute that it completed the project and has not been fully compensated.

In reply, 70th Street disputes the argument that the penalty provision is unenforceable and claims that the penalty it seeks pursuant to its contract is not grossly disproportionate to its actual

losses.

“It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues.” *Birnbaum v Hyman*, 43 AD3d 374, 375 (1st Dept 2007). “The substantive law governing a case dictates what facts are material, and [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted].” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008). “Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law.” *Flores v City of New York*, 29 AD3d 356, 358 (1st Dept 2006). “Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment.” *Id.*

The first issue to be considered is the penalty provision in the rider. “To constitute a penalty, the stipulated sum must be disproportionate to the injury or the damages flowing from the breach must be readily ascertainable [citations omitted].” *Jacobs v Citibank, N.A.*, 92 AD2d 786, 787 (1st Dept 1983), *affd* 61 NY2d 896 (1984). Penalties are not enforceable and contrary to public policy in a breach of contract action, absent statutory authorization. *See Matter of Ann-Par Sanitation, Inc. v Town of Brookhaven*, 23 AD3d 380, 382 (2d Dept 2005). Liquidated damages, however, are enforceable if their provisions are properly worded. A liquidated damages provision in a contract is enforceable as a matter of law and is not an unenforceable penalty, provided that damages flowing from an alleged breach are, at the time the parties entered into the agreement, difficult to ascertain, and the liquidated damages provision is “a reasonable

measure of the anticipated probable harm.” See *Benjamin Partners, LLC v 583-587 Broadway Condominium*, 34 AD3d 311, 311 (1st Dept 2006).

Here, 70th Street expressly asserts that the provision in the rider is one of penalty, and the provision provides the term “penalty.” The provision is not one for liquidated damages. The provision is not enforceable as is, and therefore, the recovery sought by 70th Street would be confined to actual damages proven. See *Central Irrigation Putnam Country Club Assoc., LLC*, 57 AD3d 934, 935 (2d Dept 2008).

70th Street also refers to the several lien waiver certificates executed by plaintiff prior to and after the completion of the project. 70th Street contends that these certificates constitute proof that plaintiff has waived its lien on the premises. The copies submitted by 70th Street indicate that plaintiff signed and notarized them. Plaintiff’s response to this evidence is that it did not receive the checks from 70th Street and that no proof of tendered checks is provided. Plaintiff does not comment on its apparent execution of these documents.

The court shall deny summary judgment to both parties. 70th Street has submitted proof that plaintiff has released it from the mechanic’s lien. The documents bear the parties’ signatures. Plaintiff has failed to sufficiently rebut this documentary evidence. Therefore, plaintiff’s mechanic’s lien is no longer in effect on the subject premises.

The action brought by plaintiff is one of declaratory judgment, seeking a declaration from this court that it has a valid and enforceable lien on 70th Street’s premises. With the dismissal of the lien, plaintiff has no further entitlement to this remedy, and this action is dismissed.

As for 70th Street, the penalty provision in the rider is not enforceable because of its punitive nature. Therefore, 70th Street cannot base its recovery on this ground. However, it can

recover damages due to plaintiff's delays if it can prove actual damages flowing from the delays. Plaintiff contends that 70th Street did not suffer any damages due to the delay in construction. 70th Street argues that damages include those allegedly caused by the filing of the mechanic's lien, as well as the costs of defending itself in a "frivolous" lawsuit, causing a cloud on the premises. 70th Street also refers to the inconvenience of having scaffolding on the premises for a prolonged period of time.

The court finds that 70th Street has failed to offer any evidence of actual damages in its counterclaim. For example, 70th Street has not provided any evidence of harm caused by the delayed scaffolding. 70th Street has failed to respond adequately to plaintiff's assertions of the presence of asbestos on the premises and its efforts at asbestos removal. Therefore, in failing to make out a claim for actual damages as a result of plaintiff's activities and thereby, failing to raise an issue of fact, 70th Street is not entitled to bring this counterclaim and its motion for summary judgment is denied.

Accordingly, it is

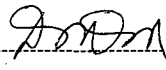
ORDERED that defendant 70th Street Apartments Corp.'s motion for summary judgement is denied; and it is further

ORDERED that plaintiff Phoenix Construction, Inc.'s cross motion for summary judgment is denied; and it is further

ORDERED that the complaint and the counterclaim are dismissed in their entirety with costs and disbursements to the parties as taxed by the Clerk upon a submission of an appropriate bill of costs.

DATED: 10/7/14

ENTER:



DONNA M. MILLS, J.S.C.
J.S.C.