

57 Graham Corp. v CP & Assoc. Constr. Corp.

2016 NY Slip Op 31451(U)

July 26, 2016

Supreme Court, New York County

Docket Number: 652282/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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57 GRAHAM CORP.,

Plaintiff,

DECISION/ORDER
Index No. 652282/2014

-against-

CP & ASSOCIATES CONSTRUCTION CORP.

Defendant.

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HON. CYNTHIA KERN, J.:

Plaintiff 57 Graham Corp. commenced the instant action seeking damages arising out of a construction project. Plaintiff now moves for an Order confirming the report of Special Referee Ira Gammerman (“Referee Gammerman”) and directing the Clerk to enter judgment in favor of plaintiff and against defendant CP & Associates Construction Corp. in the amount of \$780,000 reflecting the damages set forth in Referee Gammerman’s Report. For the reasons set forth below, plaintiff’s motion is granted.

The relevant facts are as follows. This action arises out of the construction of a building (the “Project”) at the premises owned by plaintiff located at 57 Graham Avenue, Brooklyn, New York (the “subject property”). Plaintiff entered into a written agreement with defendant pursuant to which defendant was to perform construction management services for the Project (the “Contract”). Plaintiff alleges that defendant failed to complete the Project on time and ultimately abandoned the Project.

Thereafter, plaintiff commenced the instant action asserting causes of action for breach of contract, negligence, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, unjust enrichment, fraud and conversion. Defendant did not contest liability and thus, in an Order dated July 6,

2015, this court directed an inquest on the issue of damages and that judgment shall be entered in favor of plaintiff and against defendant for the amount found upon the inquest.

On or about March 15, 2016, an inquest was held before Referee Gammerman. During the inquest, Fred Levine, plaintiff's President, testified regarding the damages plaintiff purportedly suffered, including the details of defendant's departure from the Project and the actions plaintiff took to complete the Project thereafter. After the inquest, Referee Gammerman requested, and plaintiff produced, cancelled checks corroborating Mr. Levine's testimony that plaintiff had to hire a replacement general contractor to complete the work. Based on such evidence, Referee Gammerman awarded plaintiff \$780,000 in damages, which he calculated based on the total amount plaintiff expended to complete the Project less the Contract price (the "Referee's Report"). Plaintiff now moves to confirm the Referee's Report.

Pursuant to CPLR § 4403,

Upon the motion of any party or on his own initiative, the judge required to decide the issue may confirm or reject, in whole or in part, ... the report of a referee to report; may make new findings with or without taking additional testimony and may order a new trial or hearing... Where no issues remain to be tried the court shall render decision directing judgment in the action.

"The rule is well settled that where questions of fact are submitted to a referee, it is the function of the referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility, and generally courts will not disturb the findings of a referee 'to the extent that the record substantiates his findings and they may reject findings not supported by the record.'" *Kardanis v. Velis*, 90 A.D.2d 727, 727 (1st Dept 1982), quoting *Matter of Holy Spirit Assn. for Unification of World Christianity v. Tax Comm. of City of N.Y.*, 81 A.D.2d 64, 71 (1st Dept 1981), *rev'd on other grounds*, 55 N.Y.2d 512.

In the instant action, plaintiff's motion for an Order confirming the Referee's Report is granted on the ground that Referee Gammerman's findings are substantiated by the record. Specifically, Mr. Levine testified at the inquest as follows: that defendant agreed to have the Project constructed for a final Contract price of approximately \$2.42 million; that defendant failed to complete the Project on time and ultimately

abandoned the Project; that at the time defendant abandoned the Project, plaintiff had already paid to defendant a total of approximately \$1.7 million for the Project, thus leaving \$720,000 remaining on the Contract; that after defendant abandoned the Project, plaintiff was required to hire a general contractor and an owner's representative to complete the Project for the additional amount of \$1.5 million making plaintiff's total amount spent on the Project equal to approximately \$3.2 million. In awarding plaintiff \$780,000 in damages, Special Referee Gammerman calculated the damages as the difference between \$2.42 million, the contract completion price, or what plaintiff would have paid, and \$3.2 million, plaintiff's costs expended to complete the Project.

As an initial matter, defendant's assertion that the damages award is not substantiated by the record because it was not correctly calculated is without merit. Specifically, defendant asserts that breach of contract damages are limited to reimbursements for amounts the plaintiff already paid and that not all amounts testified to have actually been paid yet. However, such assertion is without merit. Even if plaintiff had not yet paid the additional \$1.5 million it is claiming, it is well-settled that "[t]he proper measure of damages in a case such as this, where the contractor walked off the job after completing only a portion of the work required by his agreement is the difference between the contract price and the cost of completing the work left undone." *Sarnelli v. Curzio*, 104 A.D.2d 552, 553 (2d Dept 184). Thus, it is not necessary that plaintiff have actually paid the amount to the replacement general contractor in order to collect those damages. Therefore, the court finds that Referee Gammerman's damages award, which was based on the difference between the contract completion price and plaintiff's costs it had to expend to complete the project, was correct.

To the extent defendant asserts that the damages award is not substantiated by the record because Referee Gammerman improperly relied on oral testimony of Mr. Levine, an interested witness, without any supporting documentation and improperly permitted plaintiff to submit cancelled checks as such supporting documentation after the inquest, such assertion is without merit. Initially, it is well-settled that proof of

damages in the form of oral testimony is sufficient by itself. *See id.* (“The only proof offered regarding damages which is competent and worthy of consideration came from defendant himself who stated that it would cost him \$6,800 to complete the work remaining under the parties’ agreement....”) Further, defendant has failed to provide any support for its assertion that Referee Gammerman was not entitled to accept the copies of the cancelled checks as corroboration of Mr. Levine’s testimony after the inquest.

Additionally, defendant’s assertion that the damages award is not substantiated by the record because plaintiff could not have sustained any damages as there was \$1.1 million left on the Contract when defendant left the Project and the replacement general contractor’s contract was for less than that amount, is without merit. As an initial matter, such assertion is belied by the evidence adduced at the inquest that there was \$720,000 left on the Contract, not \$1.1 million. Further, such assertion ignores Mr. Levine’s testimony that the replacement general contractor’s base contract was \$987,000 but that such amount did not include all of the costs to complete the Project. Indeed, Mr. Levine testified that some of the work that defendant was required to perform under the Contract was not in the replacement contractor’s contract and that such items were additional. Defendant could have cross-examined Mr. Levine as to such extra costs and also could have called a witness in support of its defense but it failed to do so.

To the extent defendant asserts that the damages award is not substantiated by the record because Referee Gammerman improperly relied on Mr. Levine’s testimony as he did not have personal knowledge of the facts to which he testified and had to refresh his recollection using his attorney’s affirmation, such assertion is without merit. It is well-settled that “[a] witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another.” *See People v. Goldfeld*, 60 A.D.2d 1, 11 (4th Dept 1977). Further, where a witness does “not testify solely on the basis of the exhibit, but use[s] it merely to stimulate his memory,” such use is proper. *See id.* at 11-12. It is clear from the record of the inquest that Mr. Levine had personal knowledge of plaintiff’s purported damages as he was familiar with all aspects of the Project from the time plaintiff entered into the Contract with defendant until defendant left the Project

and plaintiff had to hire a replacement general contractor to complete the work and that he merely used the affirmation to refresh his recollection as to specific numbers, which Referee Gammerman properly permitted him to do.

Accordingly, based on the foregoing, plaintiff's motion is granted. It is hereby

ORDERED that the Referee's Report is confirmed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$780,000. This constitutes the decision and order of the court.

DATE : 7/26/16

CK
KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN