Flintlock Constr. Servs., LLC v HPH Servs., Inc.
2017 NY Slip Op 30733(U)
April 14, 2017
Supreme Court, New York County
Docket Number: 653920/12
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY FRIEDMAN, J.S.C.

FLINTLOCK CONSTRUCTION SERVICES, LLC, as subrogee on behalf of all those persons who are beneficiaries of New York Lien Law Article 3-A trust funds arising from a subcontract for labor and materials supplied for the project at 218-222 West 50th Street, New York, New York,

Plaintiff,

- against -

HPH SERVICES, INC., MORRIS MILLER, SHALLAN HADDAD, JOHN DOE No. 1 through 5, being fictitious names representing persons participating in or causing the diversion of trust assets and LAW OFFICES OF WEINER & WEINER, LLC as escrowee,

Defendants.

Index No.: 653920/12

DECISION/ORDER

This is an action for breach of contract and diversion of trust assets under Lien Law Article 3-A, brought by plaintiff Flintlock Construction Services, LLC (Flintlock), the general contractor of a private improvement project, against defendant subcontractor HPH Services, Inc. (HPH) and its principals, defendants Morris Miller and Shallan Haddad. Flintlock moves, pursuant to CPLR 3212, for an order granting it summary judgment as to liability on its first cause of action for breach of contract against HPH. Flintlock also seeks to dismiss the counterclaims of HPH, Miller, and Haddad (defendants).[1]

The standards for summary judgment are well settled. The movant must tender

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[1] Defendants' second counterclaim for unjust enrichment or quantum meruit is dismissed on consent. (See Defs.' Memo. In Opp. at 2, n 2.)

evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Flintlock moves for summary judgment on the ground that HPH materially breached the subcontract between Flintlock and HPH. In support of this contention, Flintlock claims that "HPH abandoned its work at the project without following the Subcontract provision requiring HPH to wait until sixty (60) days from Flintlock's alleged nonpayment before terminating the Subcontract on that basis." (Pl.'s Memo. in Supp. at 1.)

Section 7.1 of the Subcontract provides:

> "The Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due and payable under this Subcontract for 60 days or longer."

(Subcontract [Aff. of Anthony DeCapua (Pl.'s Attorney), Ex. 7].)

It is undisputed that HPH stopped work on October 15, 2012. (Haddad Dep. at 112.) Although the parties dispute the reason for this initial cessation of work, they do not dispute that HPH returned to work for one week. (Id.) Mr. Haddad testified that after HPH "demobilized" on October 15, HPH returned to work the following Monday or Tuesday and was there for a week, until HPH again demobilized when it "didn't get any answers" regarding payments for

change orders. (Id. at 111-112.) Mr. Haddad testified that he could not remember whether HPH finally ceased work before or after October 27. (Id. at 112.)[2]

In connection with HPH's cessation of work, the parties exchanged a series of letter notices. The first was a letter, dated October 15, 2012 (DeCapua Aff., Ex. 8), entitled "Notice of Termination and/or Suspension of the Subcontractor," by HPH, through its counsel, to Flintlock, This letter referred to a "dispute" over 18 change orders and also claimed that additional funds of approximately $300,000 were owed. This letter stated that "in accordance with Article 7 of the subcontractor and owner agreement, we are providing notice of termination and/or suspension of the subcontract agreement." The letter then requested that the change orders be approved within seven days and concluded: "If these requirements . . . are not carried out in accordance with this time period, HPH is terminating the contract and providing notice of termination effective November 1, 2012."

Flintlock responded by letter, dated October 17, 2012 (DeCapua Aff., Ex. 9), entitled "Notice of Default [and] Response to Subcontractor Purported Notice of Termination." This letter stated that HPH "is in default of its obligations under the Subcontract," including "1) Complete abandonment of the Work." The letter directed HPH to cure its defaults, and stated: "If cure is not commenced within 72 hours, and thereafter diligently continued, Contractor may exercise its rights to supplement Subcontractor's forces or terminate the Subcontract. . . ."

As indicated above, HPH returned to work after receipt of that letter. By letter to Flintlock, dated October 22, 2012 (DeCapua Aff., Ex. 10), entitled "Notice of Termination,"

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[2] Mr. Haddad initially acknowledged that HPH stopped working between October 11 and October 20, 2012. (Haddad Dep. at 14.) Later in the deposition, he gave more detailed testimony about the dates of the demobilization. He did not state the specific date on which HPH finally ceased work.

HPH, through its counsel, notified Flintlock of outstanding amounts claimed and provided notice of termination of the contract, effective October 26, unless the change orders were paid by that date.[3]

Flintlock responded by letter, dated October 23, 2012 (DeCapua Aff., Ex. 11), entitled "-Notice of Continuing Default -Notice of Intent to Terminate -Response to Subcontractor 2nd Purported Notice of Termination." This letter notified HPH of its continuing default and its failure to commence the cure required by the October 17 letter. The letter stated that "Contractor elects to terminate the Subcontract effective as of the close of business on October 25, 2012."

By letter, dated October 25, 2012 (DeCapua Aff., Ex. 12), entitled "Notice of Contract Default, Suspension of Work and Notice of Termination," HPH, by its counsel, again asserted that payment of over $200,000 was overdue for more than 60 days. The letter referred to HPH's prior "notice of job cessation and notice of termination," and stated that "unless [HPH] is paid for amounts due over $250,000 (described in detail in prior correspondence), and the change orders are finally approved, agreed to, disapproved, etc., my client will be terminating effective October 25th."

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[3] The October 22, 2016 letter stated, in pertinent part:

> "I refer you to Article 5 [regarding change orders] and 7 [regarding termination or suspension of the contract] of the contract between the parties which clearly shows that your company is in breach of contract at the present time. In addition, you can see this is a very unusual project. My client has been waiting months for change order decisions and payment of requisitions and other charges being paid.
>
> I am therefore providing final notice unless all of the above change orders are taken care of and my client paid no later than Friday, October 26th, my client is terminating the contract and requesting all monies due be paid immediately, including the work conducted in October. As soon as this is carried out (by October 26th) my client will be able to continue the project."

In claiming that HPH was not authorized to terminate the subcontract pursuant to section 7.1 based on Flintlock's alleged nonpayment for 60 days or longer of amounts due, Flintlock cites Mr. Haddad's deposition testimony acknowledging that no payments were overdue for at least 60 days as of October 25. (Haddad Dep. at 105-106.) This testimony is sufficient to make a prima facie showing in support of Flintlock's motion for summary judgment.

Contrary to HPH's contention, Mr. Haddad's testimony was not unclear. (Defs.' Memo. In Opp. at 7, n 3.) Moreover, in opposing the motion, HPH does not point to any deposition testimony by Mr. Haddad to the effect that payments for base subcontract work were in fact overdue for at least 60 days as of the date HPH terminated the contract or finally ceased work at the project.[4] On the contrary, rather than making a showing that the 60 day period had passed, HPH claims that "termination pursuant to the sixty (60) day period provided for in Section 7.1 of the Subcontract was a futile act, as Flintlock had already advised that it was terminating HPH and that it would not pay the outstanding sums due to HPH." (Defs.' Memo. In Opp. at 5, 7 [arguing that, given Flintlock's termination of HPH, "it is of no moment whether the monies owed to HPH were sixty days overdue"].) This contention is, in turn, based on HPH's unpersuasive assertion that Flintlock's October 17, 2012 letter (DeCapua Aff., Ex. 9) "effectively terminated the Subcontract." (Defs.' Memo. In Opp. at 5.) Flintlock's October 17 letter was, by its terms, a notice to cure. The court holds that this letter did not terminate the subcontract.

Significantly, as also discussed above, although HPH's letters refer to amounts owed for base contract work, they terminate the subcontract due – at least in part, if not solely – to

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[4] It is noted that Mr. Haddad gave deposition testimony on November 12, 2015. HPH submits Mr. Haddad's November 19, 2012 affidavit in opposition to plaintiff's motion for a preliminary injunction (Comiskey Aff., Ex. A), which is not contrary to the deposition testimony regarding overdue payments.

nonpayment of change orders. HPH acknowledges that it stopped work "because it did not receive answers from Flintlock regarding the change order issues that were the subject of the correspondence" between HPH and Flintlock. (Defs.' Memo. In Opp. at 8.) HPH does not, however, make any showing that it complied with the contractual procedures for payment of change orders. HPH refers generally to Article 5 of the subcontract, which governs changes in the Work, but fails to discuss the specific contractual requirements for submission and payment of change orders. HPH also fails to discuss specific requests for change orders or to make any showing that the change orders were timely submitted but not timely paid. (See Subcontract, § 5.2 [regarding timing for submission of claims for adjustment "in a manner consistent with requirements of the Subcontract Documents and the requirements of the Prime Contract relating to the timing for submission of such claim"].)[5]

Finally, HPH fails to demonstrate that its suspension of performance was authorized by the Prompt Payment Act (General Business Law §§ 756, et seq.) or to raise a triable issue of fact on this defense. Citing sections 756-b (2) (b) (i) and (ii), HPH asserts broadly that this statute authorizes a subcontractor to suspend performance "if a contractor fails to make payment o[r] if an owner fails to approve or disapprove a portion a contractor's invoice for the work performed" and the subcontractor gives 10 days written notice of the intended suspension. (Defs.' Memo. In

[5] HPH unpersuasively asserts that the change order provisions of the prime contract are not applicable because they do not relate to the scope of the work, and therefore are not binding on the subcontractor. In support of this contention, it cites authority, not involving change orders, that clauses in a subcontract, incorporating prime contract clauses, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor. (Defs.' Memo. In Opp. at 10-11, citing Matter of Wonder Works Constr. Corp. v R.C. Dolner, Inc., 73 AD3d 511, 513 [1st Dept 2010].) As a general matter, change orders are required where a contractor or subcontractor is directed to perform work that is not within the original scope of work. (See Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev. Corp., 108 AD3d 135, 146 [1st Dept 2013].)

Opp. at 9.) These sections do not authorize suspension of work whenever a contractor fails to make payment to a contractor but, rather, articulate specific circumstances in which suspension is authorized.[6] HRH fails to make any showing as to the particular circumstances that it claims authorized it to suspend work under the subcontract – e.g., it does not identify any undisputed invoice that it claims triggered its right to suspend. To the extent that HPH claims that Flintlock's failure to pay change orders authorized HPH's suspension under the Prompt Payment Act, it fails to submit any authority that section 756-b, which by its terms refers to "undisputed invoices," encompasses change orders.

Nor does HPH make any showing that it gave written notice of suspension at least ten calendar days before the intended suspension, as required by section 756-b (2) (b) (ii). This section provides that the notice shall "(A) inform the owner and the contractor that payment [sic] for undisputed billing amounts have not been received; and (B) state the intent of the contractor to suspend performance for non-payment." HPH's first notice that referred to the Prompt Payment Act was the October 25, 2012 letter, which purported to terminate the subcontract effective October 25. This letter referred to a prior "notice of job cessation and notice of termination." In fact, as discussed above, HPH sent two prior letters – one dated October 15, 2012, and one dated October 22, which terminated the subcontract as of November 1 and

[6] Section 756-b (2) (b) (i) provides: "A subcontractor may suspend contractually required performance if any or all of the occurrences outlined in clauses (A), (B) and (C) of this subparagraph occur and only after providing written notice and an opportunity to cure consistent with subparagraph (ii) of this paragraph." Subdivision (A) authorizes suspension if the owner "fails to make timely payments for undisputed invoices" within specified time limits "and the contractor also fails to pay the subcontractor for the approved work." Subdivision (B) provides for suspension if the owner pays the contractor within specified time limits "for undisputed invoices for work performed by the subcontractor but the contractor fails to make payment to the subcontractor" within specified time periods. Subdivision (C) provides for suspension if the owner "fails to approve or disapprove a portion of contractor's invoice for work performed by the subcontractor" within specified time limits.

October 26, respectively. Even assuming that at least 10 days' advance notice of suspension was given by these letters, notwithstanding that they did not refer to the Prompt Payment Act, neither of these letters informed Flintlock or the owner that payment had not been received for "undisputed billing amounts," and that the contractor intended to suspend for such non-payment, as opposed to failure to approve and pay change orders. HPH cites no authority that the Prompt Payment Act authorizes suspension under these circumstances.

The court has considered HPH's remaining contentions and finds them to be without merit. It bears emphasis that HPH first terminated the subcontract by its October 15, 2012 letter, effective November 1. HPH again terminated the subcontract by its October 22 letter, effective October 26. Flintlock then terminated the subcontract by its October 23 letter, effective October 25. After Flintlock terminated the contract by its October 23 letter, HPH again notified Flintlock of its termination of the contract by its October 25 letter, this time moving up the effective date to the same date as Flintlock's termination, October 25. The undisputed documentary evidence shows that HPH initiated and reaffirmed its termination of the contract. In opposition to Flintlock's prima facie showing that HPH did not meet the contractual requirements for termination of the subcontract, HPH has failed to demonstrate that, or to raise a triable issue as to whether, its termination was authorized. Flintlock is accordingly entitled to summary judgment as to liability on its breach of contract cause of action.

The branch of Flintlock's motion to dismiss defendants' first counterclaim for breach of contract will also be granted. In support of this counterclaim, HPH states only that "HPH disputes that it breached the Subcontract and that it was actually Flintlock that breached the parties' Subcontract." (Defs.' Memo. In Opp. at 13.) The only breach of the subcontract to

which HPH refers on this motion is that Flintlock "effectively terminated" the subcontract by its October 17 letter "in violation of the Subcontract." (Id. at 5.) HPH's counterclaim for breach of contract is not maintainable based on the October 17 letter, given this court's holding above that the letter did not terminate the contract.

It is accordingly hereby ORDERED that the motion of plaintiff Flintlock Construction Services, LLC for summary judgment is granted to the extent of 1) awarding plaintiff judgment as to liability on the first cause of action against defendant HPH Services, Inc. for breach of contract, and 2) dismissing with prejudice the first counterclaim of defendants HPH Services, Inc., Miller, and Haddad for breach of contract and the second counterclaim for unjust enrichment or quantum meruit; and it is further

ORDERED that the issue of damages on plaintiff's first cause of action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that, within 15 days from the date of entry of this decision and order, plaintiff shall serve a copy of this decision and order with notice of entry upon defendants by NYSCEF, unless any party is exempt, and by overnight mail, and shall e-file proof of compliance within 10 days after the aforesaid service; and it is further

ORDERED that, within 30 days of the date of entry of this decision and order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Special Referee's Office (Room 119) to arrange a date for reference to a Special Referee; and it is further

ORDERED that a motion to confirm or reject the report of the Special Referee shall be made within 15 days of the filing of the report.

This constitutes the decision and order of the court.

Dated: New York, New York
April 14, 2017

MARCY FRIEDMAN, J.S.C.