

Aluminum House Corp. v Demetriou

2018 NY Slip Op 30667(U)

April 12, 2018

Supreme Court, Suffolk County

Docket Number: 007269/2005

Judge: James Hudson

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**Supreme Court of the County of Suffolk
State of New York - Part XLVI
Memorandum Decision After Trial**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

X-----X
ALUMINUM HOUSE CORP.

Plaintiff,

-against-

ERNEST R. DEMETRIOU AND
MARGARET DEMETRIOU,

Defendants.

X-----X

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The matter at hand is a dispute arising from a contract to renovate a home. Both the contractor (Plaintiff) and the homeowners (Defendants) claim that the actions of the other prevented the completion of the agreed upon services. These differing positions precipitated the instant lawsuit sounding in Breach of Contract. The Defendants have asserted a counterclaim also claiming breach. The parties submitted to a non-jury trial to resolve the issues presented.

Prior to our analysis of facts and discussion of the applicable law, the Court wishes to thank Messrs. Berzins and Lecci for the commendable advocacy they displayed on behalf of their respective clients.

The Court heard and reviewed the following testimony and other evidence:

Mr. Damon Tamasi testified. We found him to be in all respects, a forthright and credible witness. He stated that the Plaintiff was a construction company involved in the building and renovation of homes. It is not currently in operation. He described himself as a partner in the Plaintiff Business, along with his father.

In 2004, He met the Defendants, Mr. and Ms. Demetriou in regards to Aluminum House performing renovations on their house at 20 Malts Avenue, West Islip, NY. They had a discussion and he gave them an estimate for the work. Subsequently, on April 15th, 2004, the parties entered into a Contract whereby the Plaintiff would undertake construction work at the *locus in quo* in return for remuneration in the amount of \$137,400.00 (Plaintiffs' Exhibit "3"). The specific work agreed to by the Plaintiff in return for this sum consisted of the following:

"Build 36 x 32 dormer consisting of 3 bedrooms, bathroom, living room and 5x7 kitchen. Kitchen consisting of basic white mica cabinets installed. Bathroom consisting of bowl sink and tub with tile installed on floor and 5' up around tub area. All fixtures installed in bathroom to be American standard. All electric and plumbing installed in dormer to code. Insulate, sheetrock, tape and spackle entire dormer. Side entire dormer using house wrap, green guard backer and Dutch lap vinyl siding. Install 30 year architectural roofing with 15 pound felt and ice/water shield in all valleys. New white seamless gutters and leaders installed on front and back of house. Install Builders windows according to blueprints on dormer. Install luan doors in dormer with paint grade moldings. Install pine stairs. Only sub-flooring in dormer except bathroom."

The \$137,400.00 was to be paid in increments: "\$9,000.00 on signing of contract; \$45,000.00 on start of job; \$30,000.00 on completion of framing and roof; \$25,000.00 on completion of sheetrock, tape & spackle; \$15,000.00 on completion of doors and trim; \$10,000.00 on completion of kitchen; balance (\$3,400.00) on completion."

After the contract was signed, plans were received from an architect (Plaintiffs' Exhibit "5"), a Building Permit from the Town of Islip was obtained and construction began in November of 2004.

The agreement between the parties did not remain unaltered for very long. Change Orders were agreed to by the Plaintiff and Defendants which called for additional work at an additional expense (Plaintiffs' Exhibits "6-9"). A disagreement arose between the parties as to the expectations which the homeowners had concerning the work to be performed. This was rectified in a written work schedule (Plaintiffs' Exhibit "12"). This did not result in an amicable understanding and the Defendants refused to allow the Plaintiff's employee to remain on the premises. Mr. Tamasi claims that this resulted in the Defendants owing the Plaintiff the sum of \$17,189.00 representing the balance of the contract.

On cross-examination, Mr. Tamasi admitted that the Contract (Plaintiffs' Exhibit "3") did not have a date by which the work had to be completed. Mr. Lecci also elicited answers from Mr. Tamasi that some of the items listed on the Contract and Change Orders (Plaintiffs' Exhibits "7", "8" and "11") had not been completed or he couldn't recall if they had been attended to prior to the cessation of work at 20 Malts Avenue.

Margaret Demetriou testified for the Defense. In watching her demeanor on the stand and listening to her answers, we found her powers of observation and memory to be faulty to the point where her statements were of little utility to the Court. By way of example, Plaintiffs' Exhibit "3" was shown to her on the witness stand. She indicated that she was unaware that it was a Contract. A review of this document shows that the word "Contract" is at the top of the 1st page (the written terms cover the front and back of a single piece of paper). Ms. Demetriou also stated that the Contract did not reflect an oral agreement to make the downstairs of the dwelling accessible for the physically challenged. This is at a variance with a sentence in the contract-typed in bold capital letters- which read: "Any additional work not listed above will be perforjed (sic) at an additional charge to the homeowner and paid immediately upon completion of the additional work."

Ms. Demetriou stated that she never agreed to a April 15th, 2004 Change Order (Plaintiffs' Exhibit "4"). The Change Order of August 6th, 2004, however, met with her approval. She said that the Plaintiff's representative came to her and indicated that Plaintiff had made an error in computation. This is not reflected in the written documents presented to the Court. Ms. Demetriou claimed that neither she nor her husband authorized additional costs for extra electrical work since that should have been included under the original contract. Ms. Demetriou testified that the work began on November 8th, 2004 and ended on February 24th, 2005.

She described the work as having been left unfinished and not according to her understanding of how it was to be completed. She indicated that it was deficient in the following way: the doors were not correctly installed. Spackle was spilled on the floors, no bathrooms were finished (indeed, she described the work as "virtually nothing") and no moldings were placed around the base of the walls or the windows. The baseboard heating was not installed. The back door lock was broken and there were no steps placed in the back of the house. The front door was broken. The garage side door was blocked if the front overhead door was opened. There was extensive debris and a dumpster was placed in such a fashion on the front lawn so as to damage the sprinkler. Wiring was left in the rain. In short, nothing was completed. Referring to Plaintiffs' Exhibit "12", Ms. Demetriou was shown the itemized list written on it and stated that items 1, 3-8, 10, and 11 were not completed.

Ms. Demetriou indicated that although the original Contract called for the project to be completed at a cost of \$137,000.00 dollars, the Defendants paid the Plaintiff \$172,500.00 with the work not yet completed. She further indicated that the last day the Plaintiffs performed work was on February 24th, 2005. She stated that the Plaintiff's workers cleaned up and then walked off the job when she refused to give them more money. She claims that the Plaintiff had also indicated that the entire job would take 3 months.

Ms. Demetriou stated that she hired an unlicensed contractor (Progressive) to finish the project. This cost the Defendants \$30,179.25 (Defendants' Exhibits "C-F").

When Ms. Demetriou was subjected to cross-examination, several salient factors were noted by the Court. Ms. Demetriou originally stated that she never agreed to the April 15th, 2004 Change Order (Plaintiffs' Exhibit "4"). On cross-examination, however, she admitted that it had been initialed by her husband. She also admitted, when shown Plaintiffs' Exhibit "9", that not all of the electrical work had been included in the original work estimate. Her attention was drawn to the Change Orders and she did admit that some of the work (*e.g.*, a Jacuzzi in place of a standard bathtub) was authorized after the signing of the original Contract. Ms. Demetriou also admitted that the Plaintiff gave credits for some work which the parties agreed was to be removed from the list specified in the Contract (*e.g.*, cabinets for the kitchen). Although she indicated that the money paid to Progressive was to repair and complete the work originally tasked to the Plaintiff, she was unable to provide a breakdown of what that particular work consisted of as opposed to new duties she contracted with Progressive.

Mr. Demetriou also testified. He stated that he took a series of photographs of 20 Malts Avenue on February 24th, 2005, the date that the Plaintiff stopped working on the project. These photographs (Defendants' Exhibit "G") take up eleven pages and purport to show the home in various stages of construction.

The Defendants also offered an affidavit of Mr. Damon Tamasi (dated December 6th, 2008) as a prior inconsistent statement (Defendants' Exhibit "I").

On rebuttal, Mr. Damon Tamasi was recalled to the stand. Upon being shown the Defendants' photographs (Defendants' Exhibit "G"), he disputed their accuracy. He claimed some of the photographs were taken during the time period in the middle of construction. Mr. Tamasi also stated that he did not install the door hinge screws that were of such concern to the Defendants based on inferior quality.

Since the testimony of the Plaintiff's witness and the Defendants are at a variance, the Court must sift the differing averments and find the truth.

In a non-jury trial, it falls to the Court to determine the veracity of the proof. We begin with a review of the testimony. Determination of credibility of witnesses is generally viewed as the province of the Trial Judge (*Latora v. Ferreira*, 102 AD3d 838 [2nd Dept. 2013]; *Tornheim v. Blue & White Food Prod. Corp.*, 88 A.D.3d 867, 868, 931 N.Y.S.2d 340, 341 [2nd Dept. 2011]; *Morales v. Inzerra*, 98 A.D.3d 484, 485, 949 N.Y.S.2d 433, 436 [2nd Dept. 2012]; *Hom v. Hom*, 101 AD3d 816 [2nd Dept.2012]).

"As to the quality of any given witness, the flavor of the testimony, its quirks, the witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances" (*J & K Parris Const., Inc. v. Roe Ave., Assoc., Ltd.*, 47 Misc. 3d 1227 [A], 18 N.Y.S.3d 579 [N.Y. Sup. Ct. 2015]).

After reviewing all the testimony and observing the demeanor of the witnesses, the Court finds Mr. Tamasi to be more credible than the witnesses called by the Defense.

Prior to our analysis of the aforementioned testimony and evidence we must consider Defendants' argument concerning the Plaintiff's amended pleadings. In his Post-trial Memorandum, Defense Counsel objects to the Plaintiff being permitted to amend its' pleadings to conform to the proof adduced at trial and assert a claim for Breach of Contract.

"Leave to conform a pleading to the proof pursuant to CPLR 3025 (c) should be freely granted absent prejudice or surprise resulting from the delay" (*Bryant v. Broad. Music, Inc.*, 60 A.D.3d 799, 800, 875 N.Y.S.2d 226, 227 [2nd Dept. 2009]; *citing Alomia v. New York City Tr. Auth.*, 292 A.D.2d 403, 406, 738 N.Y.S.2d 695; *see Thailer v. LaRocca*, 174 A.D.2d 731, 571 N.Y.S.2d 569]).

The law is also clear that "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side" (*Aurora Loan Servs., LLC v. Dimura*, 104 A.D.3d 796, 797, 962 N.Y.S.2d 304, 305-06 [2nd Dept. 2013]; *citing Edenwald Contr. Co. v. New York*, 60 N.Y.2d 957, 959, 471 N.Y.S.2d 55; *see U.S. Bank, N.A. v. Sharif*, 89 A.D.3d 723, 724, 933 N.Y.S.2d 293; *Public Adm'r of Kings County v. Hossain Constr. Corp.*, 27 A.D.3d 714, 815 N.Y.S.2d 621)).

We note that the Defense asserts prejudice and surprise in conclusory terms. As the Court indicated in its decision of September 14th, 2016, "...given the notice that the defense has received from the Appellate Division's decision, it would be an improvident exercise of discretion to deny an application at this juncture to conform the pleadings to the proof pursuant to CPLR 3025[c]." After reviewing the proof submitted at trial, we find no reason to disturb the Court's earlier decision.

The Court now turns to the question of whether the parties have sustained their burden of proof on the Amended Complaint and Counter-Claims.

It is beyond cavil that in order for the Plaintiff to prove a cause of action for Breach of Contract, the following elements must be established: (1) the formation of a contract between the parties; (2) performance on the contract by the Plaintiff, (3) Defendants' failure to make payment as agreed upon in the Contract of the agreed upon price; and, (4) resulting damages to the Plaintiff (*Dee v. Rakower*, 112 A.D.3d 204,208-209, 976 N.Y.S.2d 470 [2d Dept., 2013]; citing *Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc.*, 84 AD3d 122, 127 [2nd Dept. 2011]; *Brualdi v Iberia, Lineas Aereas de España, S.A.*, 79 AD3d 959, 960 [2nd Dept. 2010]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2nd Dept. 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2nd Dept. 1986]; see PJI Civil, Div.4:1, at 2. In establishing a counterclaim for Breach of Contract, it is a truism that a Defendant must meet the same burden.

In Mr. Berzin's Post Trial Memorandum of Law, he contends that the Demetrious' conduct constitutes a "clear breach of the contract" and cites to authority found in the cases of *Young v. Whitney*, 111 AD2d 1013, 490 NYS2d 330 [3rd Dept. 1985]; *Kooleraire Serv. & Installation Corp. vs. Board of Ed. Of City of NY*, 28 NY2d 101, 320 NYS2d 46 [1971]; *Allbrand Discount Liquours, Inc. v. Times Square Stores Corp.*, 399 NYS2d 700, 60 AD2d 568 [2nd Dept.1977]). For the reasons discussed below, the Court agrees with Counsel's argument.

Plaintiff relies on *Young v. Whitney*, *supra* to address the absence of a completion date in the Contract. The *Young* Court stated:

"Where a contract fails to state a date for completion of the construction of a building, a reasonable time is implied (*Senerchia Realty Corp. v. Yonkers Community Dev. Agency*, 80 AD2d 889, 890; *Lake Steel Erection v. Egan*, 61 AD2d 1125, 1126, lv dismissed 44 NY2d 646). What is a reasonable time is for the jury to determine considering the subject matter of the contract, what the parties contemplated at the time it was entered and the circumstances

surrounding performance (*Hills v. Melenbacher*, 23 AD2d 803; see 22 NY Jur 2d, Contracts, §245).” (*Id.* at 1014).

Although *Young* is a thoughtful opinion, this controlling principle has been long established in the 2nd Department and is well stated in cases such as *Schwartz v. Rosenberg*, 67 A.D.3d 770, 771, 889 N.Y.S.2d 90, 91 [2nd Dept. 2009]; *Parker v. Booker*, 33 A.D.3d 602, 603, 822 N.Y.S.2d 156 [2nd Dept. 2006]; *Manzi Homes, Inc. v. Mooney*, 29 A.D.3d 748, 749, 816 N.Y.S.2d 130 [2nd Dept.2006] and *Teramo & Co. v. O'Brien-Sheipe Funeral Home*, 283 A.D.2d 635, 636, 725 N.Y.S.2d 87 [2nd Dept.2001]).

Plaintiff’s citation to the case of *Kooleraire Serv. & Installation Corp. v. Bd. of Ed. of City of New York*, 28 N.Y.2d 101, 320 N.Y.S.2d 46 (1971) is for the general principle:

“...that a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition. In *Stern v. Gepo Realty Corp.* (289 N. Y. 274, 277) it was observed ‘one may not take advantage of a condition precedent, the performance of which he himself has rendered impossible.’” (*Id.* at 106-107 citing *Sibbald v. Bethlehem Iron Co.* [83 N. Y. 378]; *Vandegrift v. Cowles Eng. Co.* [161 N. Y. 435]).

In the more recent case of *Frank Brunckhorst Co., LLC v. JPKJ Realty, LLC*, 129 A.D.3d 1019, 1020, 12 N.Y.S.3d 241, 243 (2nd Dept. 2015), the Court discussed the doctrine of prevention which holds that “...when a party to a contract causes the failure of the performance of the obligation due, it cannot in any way take advantage of that failure.” (*Id.* at 1020 citing, *inter alia* 13 Williston on Contracts § 39:3 [4th ed., May 2015]). The applicability of the case law discussed above mandates a judgment in favor of the Plaintiff.

As noted above, the Court found the Plaintiff’s evidence (both testimonial and documentary) to be more credible than that tendered by the Defense. This moves the Court to find as follows:

The Plaintiff has proven, by a fair preponderance of the credible evidence, the existence of the aforementioned Contract for construction at 20 Malts Avenue. Indeed, the existence of the Contract has never been in doubt. “In answering the complaint, the Defendants admitted that there had been a Contract, but denied that any balance was owed to the Plaintiff” (*Aluminum House Corp. v. Demetriou*, 131 A.D.3d 986, 16 N.Y.S.3d 303 (2nd Dept. 2015)).

The Court also finds that the Plaintiff was a properly licensed home improvement Contractor (Plaintiff's Exhibits "1-2"), thus allowing it to maintain this action (*Enko Const. Corp. v. Aronshtein*, 89 A.D.3d 676, 678, 932 N.Y.S.2d 501, 504 [2nd Dept. 2011]).

We also find that the Plaintiff was in the process of rendering substantial performance by supplying services and materials when the Defendants wrongfully interfered with Plaintiff by denying its agents access to the home. Defendants refusal to pay additional funds to the Plaintiff also constitutes a breach of their contract because the Change Orders were clearly assented to by the Defendants and placed them on notice of the additional costs for the project (*see*, PJI Civil, Div. 4:7, at 6; *S. Kornblum Metals Co. v. Intsel Corp.*, 38 N.Y.2d 376, 380 [1976]; *Miller v. Schloss*, 218 N.Y. 400,407-08 [1916]).

Although the Defendants submitted some evidence that the work was left unfinished, the Plaintiff was never afforded the opportunity to complete its work. The covenant of good faith and fair dealing, implicit in every contract, was breached by the Defendants locking the Plaintiff out from the worksite (*see 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153, 773 N.E.2d 496, 500 [2002]). In contrast with the evidence which sustains the Plaintiff's claim, Defendants have failed to sustain their burden of proving a reciprocal breach on the part of the Plaintiff.

The Breach of Contract having been proven to the Court's satisfaction, it now serves to move on to the issue of damages. Mr. Berzin argues that Plaintiff is entitled to the "Contract price, less payments made and the cost of completion" and cites to *New Era Homes Corp. v Forster*, 299 NY 303, 299 N.Y. 303 (1949). This is the general rule in "...an action for breach of a fixed-price construction contract" (*Inspectronic Corp. v. Gottlieb Skanska, Inc.*, 135 A.D.3d 707, 709, 23 N.Y.S.3d 309, 311 [2nd Dept. 2016]). The Court sees no reason to depart from the rule in this case. Accordingly, the outstanding sum described in Mr. Tamasi's testimony as being owed (\$17,189.00) shall be the measure of damages, as well as pre-verdict statutory interest as of the date of the breach, February 24th, 2005 (CPLR § 5001[b]). Plaintiff shall also be awarded statutory costs and disbursements (CPLR §§ 8101, and 8301).

Settle judgment.

DATED: APRIL 12th, 2018

RIVERHEAD, NY



HON. JAMES HUDSON

Acting Justice of the Supreme Court