

Watson v ABS Contr. NY Corp.
2019 NY Slip Op 30797(U)
March 27, 2019
Supreme Court, Kings County
Docket Number: 3948/2016E
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

CARL WATSON and DOROTHY WATSON,

Plaintiffs,

-against-

ABS CONTRACTING NY CORP.,

Defendant.

DECISION / ORDER

Index No. 3948/2016E

Motion Seq. No. 5

Date Submitted: 12/6/18

Cal No. 57

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's post-verdict motion pursuant to CPLR 4404 and 4111.

Papers	NYSCEF Doc.
Order to Show Cause, Affirmation and Exhibits Annexed.....	<u>61-73</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>77-78</u>
Reply Affirmation.....	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is an action arising out of a home improvement contract (for more than \$400,000) to renovate a one-family property located at 171 MacDonough Street in Brooklyn, New York. Plaintiffs are the property owners. They terminated the contract with defendant after the defendant allegedly removed the oil storage tanks in the cellar negligently, which allegedly caused soil contamination, resulting in fines and required remediation. Plaintiffs brought this action, seeking damages for the cost of the soil remediation and other items and for the return of the unused part of their deposit.

Plaintiffs have asserted causes of action for breach of contract, negligence and to pierce the corporate veil. The claims against the individual owners were discontinued on consent. Defendant contractor disputed that it caused the contamination and counterclaimed for \$34,710, contending that plaintiffs breached the contract by terminating it without cause, and that it was entitled to be paid for the work it completed, which was more work than plaintiffs' deposit covered. A jury trial was held and on September 28, 2018, the jury rendered its verdict, finding that defendant did not breach the contract by removing the oil tanks in an unworkmanlike manner and did not cause the soil contamination. In addition, the jury ordered \$42,314.40 of the initial \$70,000 contract deposit be returned to the plaintiff.¹

Defendant now moves to set aside the verdict and contends that, in the absence of a termination-for-convenience clause, or any termination clause, since the jury found that defendant was not responsible for the oil spill, defendant was not in material breach of the contract, and that plaintiffs breached the contract by terminating the contract without cause. Thus defendant argues, *inter alia*, the jury should not have been asked to determine if the plaintiffs were entitled to the return of the unused part of the plaintiff's deposit.

Plaintiffs oppose the motion as untimely and argue that movant fails to set forth good cause (CPLR 2004) for an extension of the time limit in CPLR 4405. Further, plaintiffs argue that the subject agreement is a home improvement consumer contract and is not controlled by the legal principles for construction contracts cited by defendant.

¹A separate claim, that defendant breached the contract by starting the work before a building permit had been issued, resulted in a damage award of \$5,300, the amount of the fine plaintiffs paid to the City of New York.

The motion is denied as untimely. The jury verdict was rendered on September 28, 2018 and defendant did not move to set aside the verdict until it filed a proposed Order to Show Cause on October 30, 2018, which was signed on November 1, 2018, well beyond the 15-day deadline for such a motion (CPLR 4405; see *Bock v City of Mount Vernon*, 123 AD3d 644, 646 [2d Dept 2014] ["Supreme Court providently exercised its discretion in denying their post-trial cross motion pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages based on its determination that the cross motion was untimely"]; *Brzozowy v Elrac, Inc.*, 39 AD3d 451, 453 [2d Dept 2007] [motion that was in effect pursuant to CPLR 4404(a) to set aside the jury verdict and for a new trial, that was made more than two months after the jury verdict on the issue of damages, was properly denied as untimely]). Nor does defendant endeavor to show good cause to extend the deadline (see *Casey v Slattery*, 213 AD2d 890, 891 [2d Dept 1995] ["Supreme Court abused its discretion in overlooking plaintiff's delay since he failed to offer any explanation for his substantial delay"]).

In any event, insofar as plaintiffs had paid an initial deposit of \$70,000 toward the work, the verdict sheet properly afforded the jury an opportunity to make a determination of the value of the work performed by defendant prior to the plaintiffs' termination of the agreement. As defendant did not complete the job, it was appropriate to return the unused portion of the deposit to the plaintiffs if the value of the work performed (quantum meruit) was less than the deposit, or to award damages to defendant on its counterclaim if the value of the work performed exceeded the amount of the deposit. As this was a home improvement contract and not a commercial contract, there are specific laws that govern and the legal remedies for breach of a construction contract do not apply. Furthermore, defendant's counterclaims do not seek

"benefit of the bargain" damages, but only quantum meruit of \$34,710 (see *Whitmyer Bros. v State*, 47 NY2d 960, 962 [1979] ["Claimant, seeking the reasonable value of the work actually performed, . . . was entitled to recover damages measured on a quantum meruit basis: to wit, actual job cost plus allowance for . . . overhead and profit minus the amounts thus far paid for the work performed"]).

In a commercial context, had defendant's counterclaim actually asserted such a claim, defendant would be entitled to the total profits lost (see *Paterno & Sons, Inc. v Town of New Windsor*, 43 AD2d 863, 864 [2d Dept 1974] ["a plaintiff has the right of electing, on the breach of a contract, to maintain an action on the contract for the work performed and the material supplied and for the damage flowing from the failure of the defendant to permit him to complete the contract, or, as in the case at bar, to abandon any claim on or under the contract and to sue for quantum meruit for the work, labor and services and materials furnished"]). To be clear, defendant's claim in the motion papers, that it was entitled to be compensated by the property owners in the sum defendant would have earned as profit in completing the job, the contract price less materials and overhead, because plaintiff breached the contract, is simply not applicable to a consumer contract such as this one. Nor do defendant's counterclaims make a claim for this measure of damages. GBL § 771 governs home improvement contracts, and this contract (E-file Doc 19) does not comply with this statute at all. The contractor is thus limited by New York law to a quantum meruit recovery (*Home Constr. Corp. v Beaury*, 149 AD3d 699 [2d Dept 2017]).

Further, plaintiffs reasonably believed defendant caused the soil contamination at the time they terminated the contract. Plaintiffs were already upset that they had been fined by the Buildings Department when defendant started work before the

building permit was issued. Shortly thereafter, they were fined for the oil spill when the adjacent property owners called every agency possibly relevant to complain about the smell of fuel oil. It was only when the New York State DEC employees' reports were subpoenaed and exchanged that it became clear that the oil leak which caused the soil contamination was pre-existing and had been concealed by a cement floor in the cellar. Plaintiffs had contracted for defendant to remove the cement floor as part of the work. It was only after the cement floor was removed that the fumes were noticeable.

In conclusion, not only was the motion untimely, but defendant has failed to establish that the jury's determination should be set aside (*see Stancafi v Gunzburg*, 159 AD3d 1011, 1011-12 [2d Dept 2018] ["a jury verdict should not be set aside pursuant to CPLR 4404 (a) as against the weight of the evidence unless the verdict could not have been reached on any fair interpretation of the evidence"]).

Accordingly, it is

ORDERED that the motion is denied.

This shall constitute the decision and order of the court.

Dated: March 27, 2019

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**