Dean/Wolf Architects v Gottlieb
2019 NY Slip Op 30837(U)
March 20, 2019
Supreme Court, New York County
Docket Number: 651932/2014
Judge: Lori S. Sattler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 9

----------X

DEAN/WOLF ARCHITECTS,

Plaintiff, **Index No. 651932/2014**

-against-

Decision After Trial

STEVEN GOTTLIEB, STEPHANIE GOTTLIEB, FIFTY-FIVE CORPORATION

Defendants.

----------X

LORI S. SATTLER, J.S.C.:

This Court conducted a non-jury trial in this matter on December 13, 2018. Post-trial briefs were submitted on January 25, 2019. There were two witnesses at the trial, Charles Wolf (hereinafter "Wolf"), a partner at Dean/Wolf Architects, and Defendant Steven Gottlieb (hereinafter "Defendant"). A total of twelve documents were admitted into evidence. Defendants Stephanie Gottlieb and Fifty-Five Corporation are no longer parties to the action.

Plaintiff has a single remaining cause of action for breach of contract. Plaintiff seeks to recover $266,378.24 as of February 1, 2019, which is comprised of $48,726.24 representing services purportedly completed under the contract, $11,888.50 for additional services rendered, $50,019.75 representing lost profits on unperformed construction, and the remaining $155,743.75 constituting interest owed due to the failure to pay the above-referenced amounts.

Prior to trial, Defendant's counterclaims were struck. In the Answer, Defendant denied certain allegations listed in the Complaint. He specifically denied that Plaintiff had provided various services or that certain expenses were incurred, and that any amounts were due and owing. He further denied that he promised to pay the amounts asserted, that he breached the agreement, or that he was contractually liable for the amounts claimed.

The parties entered into a contract in April 2008 (hereinafter "Agreement"). Plaintiff asserts that Defendant is in breach of that Agreement based on his failure to make certain payments. Wolf, a licensed architect, testified to beginning work for Defendant in 2006 on an apartment located at 55 Central Park West. At the time that he was hired, a prior architect had prepared and filed plans with the Department of Buildings. Plaintiff testified to the apartment being gutted when his services commenced and contends that Defendant hired him to make changes to the prior plans as well as provide architectural services. While he initially worked without a contract, Defendant's counsel drafted the Agreement that was subsequently signed by the parties.

A construction budget of $4,000,000 was set for the work. Wolf prepared plans that were filed with and approved by the Department of Buildings. The credible testimony shows that base infrastructure construction and interior finish work was substantially completed for this project except for one item, the preparation of a "scoop" for the staircase between the floors. The testimony adduced at trial demonstrates that a $4,300 credit was given for that work due to the fact that no workable alternatives were provided by Plaintiff.

In 2010, during construction, the building stopped work in the apartment so that it could perform exterior work on the building, and while the work was stopped Defendant decided that he would try to sell the apartment in "white box" condition. In that condition all the rough and plumbing had been finished, signed off on, and inspected, and all the electrical work had been signed off on and inspected.

The project involved the expansion and complete renovation of the 19th and 20th floors at 55 Central Park West, including adding 380 square feet on the 19th floor as well as 448 additional square feet on the 20th floor. Wolf testified to the structure being "significantly complete" at the

time construction stopped. Wolf testified that 53 percent of the budgeted construction work had been completed at the time Defendant decided to sell the apartment. Thereafter, Defendant asked him to provide various additional services outside the scope of the Agreement such as floor plans that could be shown to perspective buyers. Plaintiff contends that the Agreement provided that he would bill him on an hourly basis for those additional services.

On cross examination, Wolf acknowledged that he did not have written approval from Defendant for the additional services performed. Wolf testified to $48,726.24 as an outstanding balance under the terms of the base contract, the majority of which was purportedly allocated to construction administration, and $11,888.50 for additional services performed outside the scope of the Agreement. Plaintiff also introduced into evidence an invoice dated April 28, 2011 confirming those amounts for a total of $60,614.74 owed. Plaintiff also introduced a Record of Payments dated June 1, 2014 showing it had been paid a total of $365,973.34 between March 2006 and May 2011, but the payments therein are not itemized and include payments for additional services and reimbursable expenses.

The Agreement's provisions related to basic compensation are contained in Article 11. Section 11.1 of the Agreement acknowledges that Plaintiff had been paid $133,447 prior to the signing of the contract and that with the signing of the contract an additional $10,000 was paid along with reimbursable expenses of $6,381.72.

Payment of fees going forward is set forth in Article 11.2.1:

> The fee for professional services shall be computed as 10.75% of the cost of construction as defined in Article 5.1, but in no event shall the fee for Basic Services exceed the sum of $430,000, less sums paid in accordance with Article 11.1, plus all reimbursable expenses as per Article 10.

Section 11.2.2 sets forth payment schedule for these services, with 45% payable upon completion of construction documents phase, 10% upon completion of the bidding and negotiation phase, and

the remaining 45% payable during the construction phase monthly based on the percentage of work completed by the contractor.

Section 11.2.3 states: "Until a lower budget is demonstrated, the percentage of completion for each phase shall be based upon a cost of construction of $4,000,000." The testimony adduced at trial showed that the first and second phases had been completed and when Defendant terminated the project, 53 percent of the construction budget, $2,120,000, had been spent.

Additional provisions for timing of services and payment are set forth in Section 11.5.1, which states, "If the basic services covered by this Agreement have not been completed within (18) months of the date hereof, through no fault of the Architect, extension of the Architect's services beyond that time shall be completed as provided in Subparagraphs 10.3.3 and 11.3.2." It is uncontroverted that Plaintiff's services did exceed the 18-month deadline set forth in the Agreement. Thus, under subsection 10.3.3 "compensation for any services rendered during the additional period of time shall be computed in the manner set forth in Paragraph 11.3.2." The parties acknowledge that there is no Paragraph 11.3.2 in the Agreement.

It is a basic tenet of contract law that for a contract to be enforceable there is a requirement of definiteness (*Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 474, 482 [1989]). Before a court can enforce a contractual right, there must be a determination that the contract is sufficiently definite to allow the court to ascertain the terms of the parties' agreement (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 242 [1st Dept 2013] *citing Joseph Martin, Jr. Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]).

In this matter, the contract in question is missing a critical term, that is, the method of compensation after 18 months from the Agreement's execution. Thus, the contract lacks definiteness as to the amount of compensation, if any, remaining to be paid to Plaintiff. Nor is this

Court able to determine, based on the testimony and documentary evidence presented, what fees were accrued after the 18-month period.

While this Court cannot enforce a nonexistent provision, damages may be calculated on the theory of *quantum meruit*. Plaintiff did not plead *quantum meruit* as a cause of action, however even if it had, Plaintiff fails to demonstrate that the fees sought should be awarded. Wolf did not testify to the reasonable value of his services, nor did Plaintiff present an expert to establish what a reasonable value would be (*Najjar Industries, Inc. v New York*, 87 AD2d 329, 331-332 [1st Dept 1982]). Indeed, it is difficult to discern from the invoice presented what specific work had been performed, when it was performed, and whether it was in fact reasonable.

Defendant further contends that no fees can be awarded to Plaintiff for additional services rendered because the contract requires written approval for additional work. Under Section 3.1 of the Agreement, the additional services beyond basic services shall only be provided if "authorized or confirmed in writing by the Owner." The inclusion of the word "or" in the provision therefore demonstrates that an authorization other than written approval is sufficient to collect payment for the additional work performed.

Both Wolf and Defendant testified that additional work was performed after Defendant decided to stop construction and sell the apartment. The testimony adduced at trial confirms that there were no written approvals of the additional services provided. Both parties, however, testified to conversations where Defendant requested additional services be performed outside the scope of the Agreement. Thus, Plaintiff has established that there was authorization by the Owner warranting payment of these expenses and the amount of authorized work performed after Defendant stopped construction totaled $11,888.50. Accordingly, Plaintiff is entitled to recover

the $11,888.50 with interest of 1% per month compounded monthly pursuant to section 11.5.2 of the Agreement.

Plaintiff finally claims that pursuant to section 11.5.3 it should be compensated for its lost profits with respect to the work Defendant cancelled. This section provides:

> Should any portion or segment of the Project be deleted by Owner or otherwise not constructed, compensation for such deleted portion or segment of the Project shall be payable by Owner only to the extent Services have been rendered by Architect. After the signing of contract with Contractor, Owner shall be responsible to pay Architect 55% of fee directly associated with any portion deleted or not constructed.

Wolf testified that he had completed and been compensated for 100% of the first two phases and completed 53% of the construction phase. Plaintiff therefore contends that cancellation of the work results in 47% of phase three being deleted, the compensation for which it contends would be $90,945. Plaintiff contends section 11.5.3 requires Defendant to pay 55% of this sum, or $50,019.75. However, the section read as a whole obligates Defendant to compensate Plaintiff for deleted services only to the extent they were already provided, rather than for work contemplated by the Agreement but never performed. To the extent Plaintiff lost potential earnings because Defendant stopped the project, he has no remedy under the Agreement.

Accordingly, it is hereby

ORDERED that a judgment shall enter in favor of Plaintiff Dean/Wolf and against Defendant Steven Gottlieb in the amount of $11,888.50 with interest totaling $21,172.24 as of the date of this decision.

This constitutes the Decision After Trial and Order of the Court.

Dated: March 20, 2019
New York, New York

Enter: _____
LORI S. SATTLER, J.S.C.