Line Design LLC v Pro Design, Inc.
2019 NY Slip Op 32254(U)
July 25, 2019
Supreme Court, New York County
Docket Number: 652571/2011
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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LINE DESIGN LLC

Plaintiff,

- v -

PRO DESIGN, INC.,

Defendant.

INDEX NO. 652571/2011

MOTION DATE 10/09/2018

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 111-158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 182, 183, 184, 185, 186

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff is an entity that designs and creates related "shop drawings" and "cut tickets" for the installation of stone and tile and was engaged to perform such work in connection with various construction projects on behalf of defendant, a subcontractor that fabricates and installs stone and tile. This action concerns 22 unpaid invoices pertaining to ten projects, spanning from 2005 to 2010, for which plaintiff delivered designs and provided services to defendant. In its December 18, 2017 amended complaint, plaintiff alleges 20 cause of action for unjust enrichment and *quantum meruit*.[1] Defendants' February 28, 2018 amended answer alleges ten defenses including unclean hands, laches, estoppel, and waiver. Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment as to liability for all projects, full summary

[1] Plaintiff's original September 19, 2011 consists of 22 causes of action some of which appear to be for breach of contract.

judgment as to certain invoices for some projects, and, pursuant to CPLR 5001 and 5004, for pre-judgment interest on any sums awarded for all 22 invoices, and to dismiss some defenses (NYSCEF 159). At oral argument, defendant conceded liability as to each of plaintiff's quasi-contract claims for *quantum meruit* and unjust enrichment for all ten projects (NYSCEF 181 at 14-15 [transcript]).

Prior to this motion, the parties executed a Joint Statement of Undisputed Facts (Joint Statement) to which copies of the pertinent invoices are attached (NYSCEF 111 [Joint Statement], 112-158 [annexed exhibits]). While neither the Joint Statement or attached exhibits were submitted by the parties with this motion,[2] the court deems it part of the record for Motion 004 as doing so does not prejudice either party or entitle plaintiff to relief on this motion to which it would otherwise not be entitled.

Background and Facts

1. Taubman Project (Taubman) – Invoice (Inv.) 47

Defendant hired plaintiff, at an hourly rate of $75 for the "first phase," for Taubman with no written contract in 2005; when phase one was completed, defendant paid the invoice at the specified rate. The second phase commenced the following

[2] The court is constrained by CPLR 3212, to consider, first, only the movant's submissions in support of the motion to determine whether it has established prima facie entitlement to judgment as a matter of law. Here the parties prepared the Joint Statement, attached exhibits but failed to submit it with the motion. Thus, there are no facts before the court on this motion and the record is devoid of facts which are necessary to determine the motion. While the court deems the publicly-available, unredacted Joint Statement and annexed exhibits as part of the record as both parties rely on the Joint Statement and exhibits in their memoranda of law, the court urges the parties to follow the CPLR, the Court's Trial Court Rules, the Commercial Division Rules, and this court's part rules.

summer and plaintiff's work was completed by the end of August 2007; plaintiff sent defendant an invoice for that second phase, Inv. 47, for $14,306.25 (calculated at $75 per hour) (NYSCEF 111-113). The parties agree that defendant received Inv. 47 "no later than June 8, 2010"; defendant disputes the charges, but not the fact that the work was performed, and has not paid any amount towards the balance of Inv. 47 (NYSCEF 111).

2. Humphrey Project (Humphrey) – Invs. 88 and 96

Defendant hired plaintiff for Humphrey in 2005 and the work was completed over the course of a few years, involving multiple rounds of designs and drawings, but no written proposal was executed. Plaintiff was paid a retainer by defendant which covered the initial bill for Humphrey, Inv. 87, and plaintiff later submitted Invs. 88 ($15,165.00, billed at $75 per hour and later reduced $180 due to a typographical error, for shop/design work) and 96 ($1,381.14 for printing costs at a rate of $5.10 per page). Defendant concedes that the work was performed for Humphrey but disputes and has not paid the balances, totaling $16,366.14, for Invs. 88 and 96 (NYSCEF 111, 114-117).

3. O'Brien Project (OB) – Inv. 137

A written proposal was executed for OB on July 29, 2008 which set forth an $85 per hour rate; the parties agree that the work was performed and several invoices for OB were paid in full. Defendant paid $2,040 of the $3,740 bill reflected in Inv. 137, submitted by plaintiff on June 8, 2010 (approximately 1.5 years after the work was completed), leaving a balance of $1,700—the amount which defendant alleges it was and is entitled to a credit for alleged issues with cut tickets supplied by plaintiff. That balance remains, and the parties dispute the credit (NYSCEF 111, 118, 121).

4. Mossavar-Rahmani Project (MR) – Invs. 27 and 40

A proposal at the rate of $75 per hour was executed for MR in July 2006 and the parties agree that plaintiff's work was completed. While some bills were paid in full for MR, Invs. 27 (large format printing at $5.10 per page) has an alleged $1,028.20 balance and 40 (design work at $75 per hour) an $800 balance, both of which defendant disputes that it owes due to credits for defective cut tickets and on the basis that the "rates for printing were too high" (NYSCEF 111, 122, 123, 124).

5. Lis Project (Lis) – Inv. 49

There was no written contract, but the parties agreed that plaintiff would provide printing services for Lis, which plaintiff performed, and which are reflected in Inv. 49 for $165.81 ($5.10 per page rate). Defendant paid part of that invoice in 2007, leaving a balance of $110.31, which defendant asserts it does not owe as the rates charged are too great (NYSCEF 111, 126).

6. Lagetko Project (Lagetko) – Inv. 45

No written contract or proposal was executed for Lagetko, but the parties agree that plaintiff was engaged to and did perform design work for the project, which plaintiff completed in March 2006. Plaintiff issued Inv. 45 for $9,423.75 ($75 per hour rate) no later than June 8, 2010, and no payment was made; defendant disputes owing any amount for Inv. 45 (NYSCEF 111, 127-128).

7. 88 Washington Project (88W) – Inv. 51

The parties agree that plaintiff was engaged in 2005 to perform work for 88W, with no written contract or proposal, and completed the work in mid-2006. On July 9, 2007, plaintiff sent defendant Inv. 51 (designs/services at $75 per hour rate), which

defendant paid in part, leaving a balance of $62,212.50. Defendant contends it is entitled to a $6,000 credit for 88W "to cover rent" for plaintiff's leasing workspace in defendant's shop; plaintiff disputes owing any rent (NYSCEF 111, 129-130). Plaintiff re-submitted the Inv. 51 balance on June 8, 2010; defendant disputes the reasonableness of the hours billed and "asserts that costs were unnecessarily inflated" by plaintiff's "errors in fabrication" (NYSCEF 111).

8. Lindenbaum Project (Lindenbaum) – Invs. 71-75

Defendant hired plaintiff to perform design work for Lindenbaum in 2007 and, while plaintiff sent a proposal for the project and defendant signed that proposal, defendant wrote additional terms into the document and the parties agree, in connection with Motion 004, that there was no mutual assent reached. In any event, plaintiff performed work for Lindenbaum through March 2008. Defendant paid various invoices related to the project, but Invs. 71-75, for "additional scope of work required" for four bathrooms, billed at a $75 hourly rate and amounting to a balance of $8,381.25, were submitted on October 30, 2007. Invs. 71-75 were not paid, were re-submitted to defendant in June 2010, and defendant disputes the claimed balance (NYSCEF 111, 132-138).

9. Falcone Project (Falcone) – Inv. 46

In 2005, defendant engaged plaintiff, without a written contract or proposal, to perform design work for Falcone, and plaintiff completed the work by December 2006. Inv. 46, dated July 5, 2007—while the parties dispute the date on which Inv. 46 was issued, they agree it was provided to defendant not later than June 8, 2010—states a

balance of $41,568.75 ($75 hourly rate). Defendant disputes and has made no payment toward the balance of Inv. 46 (NYSCEF 111, 138-140).

10. 7&9 Project (7&9) – Invs. 161, 162, 173, 188-189, 213, and 215

Plaintiff was engaged for 7&9 and a proposal was executed by the parties on December 6, 2008 providing for plaintiff's design services to be "billed on a time card basis of $85.00 per hour," estimated that the work would consume 734 hours, and that "[a]dditional services shall be billed" at the same rate. The parties agree that 7&9 bills are divided into two categories: "Regular Bills, which cover shop drawings and cut tickets"; and "Special Project Bills, which cover project management tasks performed by Plaintiff" (NYSCEF 111).

Various bills submitted for 7&9 were paid in full or in part. The parties agree that plaintiff asserts balances remain unpaid for the following regular bills: Invs. 161 ($2,786.50), 173 ($3,570), 213 ($55,038.53), and 215 ($6,043.50). As to special bills, plaintiff asserts unpaid balances for the following: Invs. 162 ($1,720), 188 ($2,550), and 189 ($340). Each of those 7&9 bills were resubmitted to defendant on June 8, 2010. Defendant disputes owing those amounts, which total a balance of $72,048.25 (NYSCEF 111, 141-158).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment as to liability and damages for all invoices but for the regular bill invoices for 7&9, and the invoices for Humphrey, 88W, Lindenbaum, and Falcone, for which plaintiff concedes that expert testimony and a trial as to the reasonableness of the hours billed is necessary; however, plaintiff argues that the reasonableness of the billing rate should be summarily decided in its favor. Specifically, plaintiff seeks summary judgment on the issues relating to all

invoices pertaining to delivered drawings on the basis that the rate was uniform throughout the parties' business relationship, and defendant paid that rate consistently without objection.

Plaintiff further moves, pursuant to CPLR 3212, for partial summary judgment as to liability for OB, MR, and 7&9 under a breach of contract theory since plaintiff was engaged for each of those projects with an executed project-proposal including, among other things, hourly rates for plaintiff's services and plaintiff's estimate of billable hours. Plaintiff, alternatively and additionally, seeks partial summary judgment as to liability as to all projects and invoices under its theories of quantum meruit and unjust enrichment.

Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [internal quotation marks and citation omitted]). "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]). If the movant makes the requisite showing, the burden shifts to the opposing party to present evidentiary facts sufficient to raise triable issues of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court is required to examine the evidence in the light most favorable to the opposing party (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]), and summary judgment "should not be granted where there is any doubt as to

the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

Preliminarily, the court declines to exercise its discretion under CPLR 3212 to "conform the pleadings to the proof" and deem plaintiff's amended complaint to contain a cause of action for breach of contract as to the three projects for which the parties executed a formal proposal—7&9, OB, and MR (*see Kramer Levin Naftalis & Frankel LLP v Canal Jean Co., Inc.*, 73 AD3d 604, 605 [1st Dept 2010] [finding that omission of a claim does not absolutely bar summary judgment for the unpleaded claim under certain circumstances]). Plaintiff's request is contradicted by its recent amendment of its complaint, deleting its contract causes of action. Plaintiff offers no reason to restore claims it deleted in December 2017. Nonetheless, plaintiff's evidence does not support a finding of breach of contract as a matter of law.

The executed proposals do, however, establish the applicable hourly rate at which plaintiff would bill for those three projects ($85 for 7&9 and OB; $75 for MR) and defendant has failed to raise a triable issue of material fact as to those rates. Nonetheless, issues of fact exist as to the scope of those proposals, and—specifically, the hourly rate at which plaintiff would bill for its services—remain as to various issues involving the unpaid invoices for those projects. For example, the proposals are clear that aspects of plaintiff's work are subject to final approval (*see* NYSCEF 141 [7&9 proposal]) and defendant challenges certain work as unauthorized, and the proposals do not provide any provisions relating to defective work/deliverables from plaintiff or credits to defendant which may arise from such defects, issues that remain as to both OB and MR.

Next, in the Joint Statement, the parties agree as to the general services performed by plaintiff, plaintiff's delivery of all shop drawings and cut tickets, and defendant's use of the delivered drawings and tickets; further, they agree that plaintiff was to be paid monetarily for its work on all projects.

A plaintiff establishes a quantum meruit claim when it demonstrates "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Caribbean Direct, Inc. v Dubset, LLC*, 100 AD3d 510, 511 [1st Dept 2012], quoting *Moses v Savedoff*, 96 AD3d 466, 471 [1st Dept 2012]). "The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]).

Though liability as to the services rendered is conceded, the court finds that issues of fact preclude summary judgment as to damages under the quasi-contract claims given the paucity of plaintiff's submissions and the equivocality of the parties' Joint Statement. The following issues remaining for the court involve, as to damages only: whether defendant is entitled to the credits it claims for defective work/drawings/tickets; whether plaintiff's billed hours are reasonable as to all projects, particularly in light of issues of fact as to whether certain invoices were backdated; whether certain invoices were approved or objected to; whether defendant is entitled to a credit for plaintiff's rental of workspace; whether the hourly billing rates for the projects other than 7&9, OB, and MR are reasonable, and whether the printing rates for certain projects are reasonable.

Plaintiff's request for prejudgment interest is denied as premature.

Plaintiff's request to dismiss the third, fourth and sixth defenses is denied as plaintiff fails to address them after listing them in the notice of motion. Instead, plaintiff attacks the eighth defense for failure to perform which is not mentioned in the notice of motion.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment is granted in part; and it is further

ORDERED that plaintiff is awarded partial summary judgment on consent as to defendant's liability for all ten projects under plaintiff's quantum meruit and unjust enrichment claims; and it is further

ORDERED that plaintiff is awarded partial summary judgment as to its hourly billing rates for the 7&9, OB, and MR projects pursuant to the parties' executed proposals for those three projects; and it is further

ORDERED that the parties will proceed to take limited, expedited discovery on the issues of damages outlined in the decision above, with deadlines other than those below to be determined at the forthcoming status conference on 8/6/19 at 11:30 am/pm at 60 Centre Street, Room 242; and it is further

ORDERED that all damages discovery—inclusive of any expert discovery— shall be completed by November 15, 2019, the end-date for all discovery; and it is further

ORDERED that any motions in limine shall be filed within 30 days of the close of damages discovery or else waived; and it is further

ORDERED that trial on damages will be conducted on 1/13, 2020 and it is further

ORDERED that plaintiff's motion is denied without prejudice as to prejudgment interest and dismissal of certain defenses.

7/25/19
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE