West Flooring & Design, Inc. v K. Romeo, Inc.
2019 NY Slip Op 32475(U)
August 22, 2019
Supreme Court, Suffolk County
Docket Number: 15-10412
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 15-10412
CAL. No. 18-01549-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 10/25/18 (#003)
MOTION DATE 12/13/18 (#004)
ADJ. DATE 12/13/18
Mot. Seq. #003 - MotD
Mot. Seq. #004 - XMD

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WEST FLOORING & DESIGN, INC.,

Plaintiff,

- against -

K. ROMEO, INC., HARSH PADIA, and PAUL CONSIGLIO CONTRACTING, INC.,

Defendants.

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Attorney for Plaintiff:
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants K. Romeo, Inc. and Harsh Padia, dated October 3, 2018, and supporting papers (including Memorandum of Law); (2) Notice of Cross Motion by the plaintiff, dated November 2, 2018, and supporting papers (including Memorandum of Law); (3) Affidavit in Opposition by defendants K. Romeo, Inc. and Harsh Padia, dated December 4, 2018, and supporting papers; (4) Affirmation in Opposition by defendants K. Romeo, Inc. and Harsh Padia, dated December 5, 2018, and supporting papers (including Memorandum of Law); and (5) Reply Affirmation by the plaintiff, dated December 12, 2018, and supporting papers (including Memorandum of Law); it is

ORDERED that the motion by defendants K. Romeo, Inc. and Harsh Padia for an order (i) pursuant to CPLR 3212, granting summary judgment "formally discharging" the mechanic's lien filed by the plaintiff on September 9, 2015 and bonded by defendant K. Romeo, Inc. on March 28, 2016, dismissing the plaintiff's cause of action to foreclose the lien, and dismissing the complaint in its entirety against defendant Harsh Padia, and (ii) awarding attorney's fees for the filing of a willfully exaggerated lien under Lien Law § 39 or, alternatively, under the indemnities provided by the plaintiff in favor of defendants K. Romeo, Inc. and Harsh Padia, is granted to the extent of granting summary judgment dismissing the plaintiff's cause of action to foreclose the lien and dismissing the complaint in its entirety against defendant Harsh Padia, and is otherwise denied; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR 3212, granting partial summary judgment in its favor and against defendants K. Romeo, Inc. and Harsh Padia on the issue of liability, is denied.

In this consolidated action, the plaintiff seeks to recover damages for work, labor, and services allegedly performed in connection with the construction of a residence at 155 Highland Terrace, Bridgehampton, New York.

On or about August 14, 2013, Harsh Padia, the owner of the property, and K. Romeo, Inc., a general contractor, entered into a contract for the construction of a single-family dwelling on the property. Thereafter, on or about July 14, 2014, K. Romeo and the plaintiff entered into a subcontractor agreement ("the agreement") pursuant to which the plaintiff agreed to supply and install certain materials at the property, including 10,420 square feet of wood flooring, in exchange for payment of $234,894.00. Paragraph 10.2 of the agreement provides that

> If the Subcontractor's employment is terminated in accordance with this Agreement, it shall not be entitled to receive any further payment under this Agreement until the Work is wholly completed to the satisfaction of Contractor, Owner and Architect. If the unpaid balance of the amount to be paid under this Agreement exceeds the cost and expense incurred by Contractor in completing the Work, this excess shall be paid to the Subcontractor; but if the cost and expense of completing the Work exceeds the balance unpaid, then the Subcontractor shall pay and remain liable to Contractor for the difference. Such cost and expense shall include not only the cost of completing the Work but Subcontractor's liability shall also extend to warranty and re-work costs, Contractor's liability, if any, to third parties, all losses, damages, payable by Contractor pursuant to the Prime Contract, and such other costs and expenses, including attorneys' fees and disbursements, resulting from the Subcontractor's default, or incurred by Contractor in any action or proceeding against Subcontractor or its sureties to enforce any of Contractor's right as provided herein.

It appears that the plaintiff also executed a separate indemnification agreement, dated March 2, 2015, whereby the plaintiff agreed to indemnify and hold harmless K. Romeo and Padia (collectively, "the defendants") from and against any and all claims, including reasonable legal fees and costs, arising from its acts or omissions in connection with its work at the property.

Ultimately, a dispute arose among the parties regarding the quality of the materials supplied by the plaintiff. On April 1, 2015, the plaintiff sent an e-mail to K. Romeo, confirming a prior exchange to the effect that the plaintiff "had exhausted all [its] suppliers" for flooring material in the lengths required under the agreement, and suggesting that "if we can not agree to install the material on site, we can take the material back, refund your money, and you can purchase new material and we will gladly finish it." K. Romeo's response, the following day, indicated that K. Romeo would "explore [its] options, discuss

them with the home owner, and get back to you once we make a decision." It appears that K. Romeo subsequently arranged for a substitute flooring contractor, Woodwrights Wide Plank Flooring, to supply the materials, labor, and other services required to complete the flooring work; according to the plaintiff, however, K. Romeo did not inform the plaintiff of this until on or about May 9, 2015, when K. Romeo requested that the plaintiff remove its allegedly nonconforming flooring materials from the property. On May 11, 2015, K. Romeo sent an e-mail to the plaintiff, referring to its need "to source the work out" and advising that when the work "has been satisfactorily completed, you will be notified, presented with any and all outside invoicing necessary to complete your work. If there is a balance left, you will receive it after signing a lien release. Till that time no West flooring invoicing will be processed."

It is K. Romeo's claim that the plaintiff not only failed to complete the work but also abandoned the project, having supplied and installed less than 8,000 square feet of the flooring and having failed to supply or install any of the wood trim or stair treads required under the agreement, despite having been paid a total of $174,565.10. As a result of the plaintiff's failure to perform the agreement, K. Romeo claims that it was obligated to retain a new subcontractor to replace portions of the flooring that were improperly installed and to complete the work. The plaintiff, for its part, claims that it had completed approximately 90% of the work when K. Romeo unilaterally terminated the agreement without offering the plaintiff an opportunity to cure or to replace the allegedly defective materials. According to the plaintiff, at the time of termination, it was owed a balance of $103,605.10 (including change orders in the amount of $43,276.26).

The plaintiff commenced this action (Action No. 1) on June 12, 2015, alleging causes of action for recovery in breach of contract, unjust enrichment, and quantum meruit. In its answer, K. Romeo alleged counterclaims for recovery in breach of contract, unjust enrichment, and breach of warranty, plus attorney's fees as provided under section 10.2 of the agreement. Padia, in lieu of answer, moved to dismiss the complaint on the ground, *inter alia*, of lack of privity. On September 9, 2015, the plaintiff filed a notice of mechanic's lien in the amount of $73,334.72 against the property, identifying March 27, 2015 as the date on which the last item of material was furnished and May 9, 2015 as the date on which the last item of work was performed. On November 2, 2015, the plaintiff commenced an action (Action No. 2) to foreclose its lien (Sup Ct, Suffolk County, Index No. 15-611626), naming Paul Consiglio Contracting, Inc. as an additional defendant. On January 22, 2016, the plaintiff filed a notice discontinuing Action No. 2 against Paul Consiglio Contracting, Inc. On March 31, 2016, K. Romeo filed a bond in the amount of $80,668.19, in accordance with Lien Law § 19 (4), with Westchester Fire Insurance Company as surety, discharging the lien against the property. By order dated July 1, 2016, the court, *inter alia*, granted Padia's motion to dismiss the complaint against him in Action No. 1, and further granted the plaintiff's application to consolidate the actions under Index No. 15-10412.

Now, discovery having been completed and a note of issue having been filed on August 21, 2018, the defendants timely move and the plaintiff timely cross-moves for summary judgment.

As to the first item of relief requested by the defendants, *i.e.*, an order granting summary judgment "formally discharging" the lien based on the filing of the bond, it is denied. Lien Law § 19 (4) provides, in part, that a mechanic's lien for a private improvement may be discharged "by the owner or contractor executing a bond or undertaking in an amount equal to one hundred ten percent of such lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien." Paragraph (a) of Lien Law § 19 (4) further provides that any such bond or undertaking "shall be filed with the clerk of the county in which the notice of lien is filed, and a copy shall be served upon the adverse party. The undertaking is effective when so served and filed." Here, although it is not disputed that a bond was duly filed in accordance with paragraph (a), the defendants failed to establish the element of service and, therefore, failed to establish the effectiveness of the bond to discharge the lien. It is noted, in any event, that paragraph (a) provides for discharge of a lien upon such service and filing without need for a court order (*see* ***Sanco Mech. v DKS Gen. Contrs. & Constr. Mgrs.***, 34 AD3d 271, 824 NYS2d 69 [2006]); had the defendants demonstrated compliance with paragraph (a), their request would be academic.

Summary judgment is granted, however, dismissing the plaintiff's cause of action to foreclose the lien and dismissing the complaint in its entirety against Harsh Padia, and the plaintiff's reciprocal request for summary judgment in its favor on its cause of action to foreclose the lien is, correspondingly, denied. For the reasons discussed below, the court finds, as a matter of law, that the plaintiff failed to timely file its lien.

Lien Law §10 provides that where, as here,

> the improvement is related to real property improved or to be improved with a single family dwelling, the notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished * * *.

Lien Law § 3 provides, in relevant part, that a contractor "who performs labor * * * for the improvement of real property with the consent or at the request of the owner thereof * * * shall have a lien for the principal and interest, of the value, or the agreed price, of such labor * * * from the time of filing a notice of such lien as prescribed in this chapter". Lien Law § 2 (4) provides that the term "improvement" includes "any work done upon * * * property or materials furnished for its *permanent improvement*" (emphasis added).

It appears to be undisputed that the plaintiff did not furnish any materials for the project at any time after March 2015. The plaintiff claims, however, that on May 9, 2015, it inspected the quantity of its completed work and the construction of certain disputed stair treads at the property, measured and removed certain flooring materials from the property which K. Romeo had deemed nonconforming, and performed an inventory of its materials and completed work; the plaintiff claims that it was required to

perform this work pursuant to article 9 of the agreement, entitled "Inspection and Defective Work," which provides that

> The Subcontractor shall at all time provide for the sufficient, safe and proper inspection of the Work in the field or any other place where materials or equipment for the Work may be, whether or not fully manufactured. The Subcontractor shall remove and properly replace all materials which the Architect, Owner or Contractor determines is in any way failing to conform with the requirements of the Contract Documents within twenty-four (24) hours after receiving written notice from the Contractor.

The plaintiff concedes that no lienable work was performed after May 9.

Even assuming, for purposes of this motion, that the plaintiff performed all the items of work it claims to have performed on May 9, it is evident that such work was not lienable and, therefore, that the lien was not timely filed. The court recognizes that there is a dearth of appellate authority on as to what types of contractor work fall within or without the category of "improvement" under Lien Law §§ 2 (4) and 3; also, that the relevant statutory provisions are "to be construed liberally to secure the beneficial interests and purposes thereof" (Lien Law § 23). Nevertheless, in reviewing the existing case law, the court is compelled to conclude that the work allegedly performed by the plaintiff on May 9 does not fall within the ambit of the Lien Law. To determine whether any particular item of work is properly the basis of a mechanic's lien, the question to be answered is whether it was an improvement or a necessary part of the work done on the property for its permanent improvement (***Goldberger-Raabin, Inc. v 74 Second Ave. Corp.***, 252 NY 336 [1929]). As for the inspection the plaintiff claims to have performed, the court is aware of no case in which the services for which the lien is claimed did not result in an actual physical permanent improvement and took place a month or more after the lienor's construction work had ceased (*see generally* ***Matter of Old Post Rd. Assoc. [LRC Constr.]***, 60 Misc 3d 391, 77 NYS3d 283 [2018]). While it may have been required under the agreement, such an inspection is too remote to be considered "part of the work of improving property for which the law provides a lien" (***Goldberger-Raabin, Inc. v 74 Second Ave. Corp.***, *supra* at 342). That the plaintiff may also have performed an inventory of its materials and completed work likewise fails to basis for the lien; such work cannot be said to have enhanced the value of the property in any way and, presumably, was done for the plaintiff's sole benefit. And as to the removal of the allegedly nonconforming flooring materials—also required under the agreement—such work cannot be said to have led to any improvement of the property so much as it restored the status quo. Plainly, if the flooring delivered to the property did not become part of the "permanent improvement," it would be illogical, at best, to characterize its removal from the property as such.

The defendants' remaining request for an award of attorney's fees is denied. Pursuant to Lien Law § 39, in any action to enforce a mechanic's lien, "if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void." Where a lien has been discharged under section 39, Lien Law § 39-a permits the

recovery of damages; it provides that if a lien is declared void on account of willful exaggeration, the person filing the lien "shall be liable in damages to the owner or contractor," which amounts shall include the amount of any premium for a bond given to obtain the discharge of the lien and reasonable attorney's fees for services in securing such discharge. Citing those sections, the defendants contend that the plaintiff's lien is willfully exaggerated because it is the product of a fraudulent misstatement that the plaintiff performed work within four months of the date of its filing, and that they are entitled, therefore, to damages. The court disagrees. Where a lien has been discharged for reasons other than its supposed exaggeration—*e.g.*, that it was untimely filed, as here—and the foreclosure action has been terminated, damages are not available under section 39-a (***Wellbilt Equip. Corp. v Fireman***, ___ AD2d ___, 719 NYS2d 213 [2000]; ***Guzman v Estate of Fluker***, 226 AD2d 676, 641 NYS2d 721 [1996]).

Alternatively, the defendants seek reimbursement of their legal fees under the March 2, 2015 indemnification agreement, which provides, in relevant part, as follows:

> To the fullest extent permitted by law, West Flooring, Inc. [Sub-Contractor] agrees to defend, indemnify and hold harmless K. Romeo Inc. [Contractor] or Harsh and Parvi Padia [Homeowners], its officers, directors, agents and employees from and against any and all claims, suits, liens, judgments, damages, lawsuits and expenses including reasonable legal fees and costs arising in whole or part and in any manner from acts, omissions, breach or default of sub-contractor, in connection with performances of any work by sub-contractor, its officers, directors, agents, employees and sub-contractors in reference to the project located at 155 Highland Terrace in Bridgehampton, New York.

Even were the court to overlook the fact that this theory of recovery was never pleaded, the quoted language is insufficient to support a finding that the plaintiff agreed to indemnify the defendants for their attorney's fees arising from claims between the parties themselves. "Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is *unmistakably clear* from the language of the promise" (***Hooper Assoc. v AGS Computers***, 74 NY2d 487, 492, 549 NYS2d 365, 367 [1989] [emphasis added]). Thus, for an indemnification clause to cover claims between the contracting parties rather than third-party actions, the language must "exclusively or unequivocally" reflect that the parties intended for indemnification of costs arising out of litigation between the parties (*id.* at 492, 549 NYS2d at 367). If the clause has the potential to cover third-party claims as well as claims between the parties, interparty reimbursement will not be permitted (***Gotham Partners v High Riv. Ltd. Partnership***, 76 AD3d 203, 906 NYS2d 205 [2010], *lv denied* 17 NY3d 713, 933 NYS2d 653 [2011]). Here, since the clause is framed in language "typical of those [agreements] which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim," it is not "unmistakably clear" that the parties intended it to cover costs arising out of litigation between them (***Hooper Assoc. v AGS Computers***, *supra* at 492, 549 NYS2d at 367).

The plaintiff's argument in support of its cross motion is twofold. First, the plaintiff contends that it is entitled to the full balance due under the agreement even if K. Romeo's unilateral completion of the plaintiff's work was justified, inasmuch as K. Romeo incurred no costs or expenses to complete the work because it was fully compensated for such work by the homeowner; paragraph 10.2 provides that if the unpaid balance "exceeds the cost and expense incurred by Contractor in completing the Work, this excess shall be paid to the Subcontractor." Second, it contends that K. Romeo failed to satisfy a condition precedent under paragraph 10.1 by neglecting to provide the plaintiff with a written termination notice prior to undertaking the completion of the plaintiff's work, thus forfeiting any right it may have had under paragraph 10.2 to offset amounts owed to the plaintiff. Paragraph 10.1 provides, in part, that

> Should the Subcontractor fail at any time and in any respect to prosecute the Work with promptness and diligence * * * or fail to supply sufficient number of skilled workers or a sufficient quantity or quality of materials * * * or fail to perform any of its obligations under the Contract Documents, or abandon the Work * * * then the Subcontractor shall be in default under this Agreement and Contractor shall have the right, in addition to any other rights and remedies provided under the Contract Documents or by law, after three (3) days written notice to the Subcontractor: (a) to perform or furnish any such labor and materials with Contractor's own forces or by retaining a separate contractor as many times as necessary to further progress and/or complete the Work, and to deduct the cost thereof from any monies due or to become due to the Subcontractor * * *.

As to the plaintiff's first argument, the court notes that whether K. Romeo was reimbursed by the homeowner for any portion of the cost and expense it incurred to complete the work—and K. Romeo concedes that it received such reimbursement in the amount of $77,392.10—is irrelevant for purposes of determining the plaintiff's entitlement to damages. Insofar as the mission of paragraph 10.2 is to protect the contractor upon the subcontractor's default, it does so by insuring that the subcontractor remains liable for payment to the extent that the cost and expense incurred by the contractor in completing the subcontractor's work exceeds the amount due to the subcontractor. Here, the plaintiff claims that it is owed a balance of $103,605.10 under the agreement. Whether K. Romeo received all or a portion of that amount from the homeowner, arising from a separate contractual relationship, has no bearing on the computation of damages under paragraph 10.2. Had K. Romeo received from the homeowner more than the amount it owes under the agreement, that might raise the specter of an unjust enrichment windfall—but that is not the case here.

The court is also constrained to note, relative to the second argument, that the plaintiff's reference to the three-day notice provision set forth in paragraph 10.1 is a red herring, at least for purposes of determining its cross motion. It is undisputed that no such notice was sent. Even assuming, however, that providing such notice was a condition precedent to K. Romeo's right to terminate the agreement, it does not appear how any failure on the part of K. Romeo to fulfill the condition would entitle the plaintiff to judgment for any of the relief demanded in the complaint. Reading paragraph 10.1

together with paragraph 10.2, it is evident that providing the required notice is a condition only to K. Romeo's exercise of certain rights under the agreement—retaining a substitute contractor to complete the plaintiff's work, deducting the cost of that work from any amounts due to the plaintiff, terminating the plaintiff's employment for all or any portion of the work, and withholding payment to the plaintiff pending satisfactory completion of the work—and relevant only to K. Romeo's counterclaims (*cf.* ***Northeast Constr. Group v Deconstruction, Inc.***, 16 AD3d 357, 793 NYS2d 17, *lv denied* 5 NY3d 709, 803 NYS2d 30 [2005]). For the plaintiff to establish its own right to recovery under paragraph 10.2, it would still have to establish that the unpaid balance owed to it exceeds the cost and expense incurred by K. Romeo in completing the work, irrespective of whether K. Romeo satisfied the condition. It has not done so. In any event, there would appear to be an unresolved issue of fact whether the plaintiff's April 1, 2015 e-mail was a statement of its inability to perform *in futuro* or, as it claims, an effort to amicably resolve the parties' dispute; consequently, it cannot be concluded as a matter of law whether the plaintiff repudiated the agreement prior to termination and whether K. Romeo was thereby relieved from the performance of futile acts or conditions precedent (*see e.g.* ***J. Petrocelli Constr. v Realm Elec. Contrs.***, 15 AD3d 444, 790 NYS2d 197 [2005]; ***Allbrand Discount Liqs. v Times Sq. Stores Corp.***, 60 AD2d 568, 399 NYS2d 700 [1977], *lv denied* 44 NY2d 642, 405 NYS2d 1026 [1978]).

The court directs that the cause of action as to which summary judgment was granted is hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: August 22, 2019
Riverhead, New York

WILLIAM G. FORD J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION