Skrobola v All Pro Paving Co., Inc.
2019 NY Slip Op 34019(U)
April 22, 2019
Supreme Court, Orange County
Docket Number: EF001788-2017
Judge: Maria S. Vazquez-Doles

At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange located at 285 Main Street, Goshen, New York 10924 on the 22nd day of April, 2019.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

MICHAEL SKROBOLA and MARY SKROBOLA,

PLAINTIFFS,

-AGAINST-

ALL PRO PAVING CO., INC.,

DEFENDANT.

DECISION AFTER INQUEST
Index No. EF001788-2017
Inquest dates: 3/20/18 & 12/6/18

VAZQUEZ-DOLES, J.S.C.

Procedural History

This action was commenced by the filing of a Summons and Complaint on March 6, 2017. Defendant was personally served at the corporation's place of business on April 17, 2017 by service upon the managing agent, Dina DeGroodt at 10 Martin St., Pine Bush, New York. Defendant failed to answer or appear and a default judgment on liability was granted by Decision and Order dated September 29, 2017. An inquest on damages was scheduled and held on March 20, 2018 and continued on December 6, 2018 wherein the Court heard testimony from Michael Skrobola, Chris Nagel, and Don Erwin, a construction expert. The Court also received several documents including two estimates to repair the defective condition of the driveway. The following constitutes the findings of fact and conclusions of law following an inquest after default.

FACTS

Plaintiff alleges that he contracted with Defendant to re-color and seal the circular driveway in front of his house. The original asphalt circular driveway was created in 2001 for the cost of $13,850.00. The driveway is a textured asphalt stamped to look like Belgian block and colored grey. The written contract at issue, dated June 15, 2015, specifically said that Defendant would recolor the circle for $4,500, patch around the drain for $800, and seal for $1,200 and seal

the apron for $750. This total amount of $7,250, was paid in full by Plaintiff. Defendant completed the job in August of 2015, but it was never done to the satisfaction of Plaintiff as it appeared black and not grey. Moreover, within a few months, the grey coloring began peeling off and did not stick to the asphalt, which has left an unsightly driveway of grey and black peelings. Plaintiff presented evidence through the testimony of Don Erwin, that the coloring was applied incorrectly. Mr. Erwin opined that the manufacturing instructions of the coloring, made by Seal Master, required a certain foundation before the color was applied. These instructions also warned against using an asphaltic oily sealer prior to applying the color as that type of sealer prevents the color from adhering to the asphalt. Upon an inspection of the driveway after Defendant completed the job, the expert could see the color 'delaminating', chipping away and generally not sticking to the surface of the asphalt. He determined that this was caused by Defendant applying the acrylic based color over a surface which had been treated with a coal tar or asphalt based sealer.

Plaintiff also presented evidence of the cost of repairing the now chipped and peeling driveway. The expert opined that there were two methods of repair. One was to remove the existing driveway and begin anew, and the other was to 'mill' or sand down the existing driveway and reapply a clean layer of asphalt which could be recolored. The cost for doing these repairs ranged from $15,600.00 to $19,650, based upon two estimates from local businesses. Plaintiff seeks the lower of the two, $15,600, to repair the driveway, in addition to costs and attorney fees.

Analysis:

Generally, "... contract damages are intended to place a party in the same position as he or she would have been in if the contract had not been breached...". *Wenger v Alidad*, 265 AD2d 322 [2d Dept 1999]. In this case, the contract was to repair and color Plaintiff's driveway. Defendant failed to do so and in fact created a surface which now needs to be removed and redone. Accordingly, Plaintiff is entitled to recover an amount which will complete the job, to

wit $15,600.00, and the costs associated with bringing this action.

However, Plaintiff's request for attorney fees, is denied. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule (citing, *Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5, 511 N.Y.S.2d 216, 503 N.E.2d 681; *Mighty Midgets v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21–22, 416 N.Y.S.2d 559, 389 N.E.2d 1080; *City of Buffalo v. Clement Co.*, 28 N.Y.2d 241, 262–263, 321 N.Y.S.2d 345, 269 N.E.2d 895)." *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]. In this case, the contract makes no mention of attorney fees or what the parties intended in the event of a breach.

Notwithstanding the lack of a contractual provision, Plaintiff argues that attorney fees in the amount of $10,347.00 should be granted due to the defective workmanship and Defendant's 'bad faith' in not appearing in this action. Plaintiff asks the Court to follow the case of *Chase Bank USA, NA v Hale*, 19 Misc.3d 975[NY County Sup.2008], which confirmed an arbitration award of attorney fees against a represented defendant for the frivolous claim that the credit card company violated TILA. Plaintiff argues that this Court has the discretion to award fees in this case as well.

Upon a review of the case law provided by Plaintiff, attorney fees are not appropriate in this case. The facts of this case are distinguishable from *Chase Bank* on many levels, but the most important of which is that the instant Defendant was not represented by an attorney who, with knowledge of the law, pursued a defense which was baseless. Furthermore, "...punitive damages are not recoverable in an ordinary breach of contract case, as their purpose is not to remedy private wrongs but to vindicate public rights" (*citing Tartaro v. Allstate Indem. Co.*, 56 A.D.3d 758, 758, 868 N.Y.S.2d 281). "Punitive damages are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the

conduct was aimed at the public generally" (id.; *citing New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 315–316, 639 N.Y.S.2d 283, 662 N.E.2d 763; *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 612, 612 N.Y.S.2d 339, 634 N.E.2d 940)."

Reads Co., LLC v Katz, 72 AD3d 1054, 1056-57 [2d Dept 2010]. The facts in this case do not give rise to a punitive award of attorney fees. Accordingly, it is hereby

ORDERED that Plaintiff is awarded contract damages in the amount of $15,600, plus costs of bringing this action, and it is further

ORDERED that Plaintiff's request for attorney fees is denied.

Plaintiff is directed to submit judgment with a bill of costs, on notice to Defendant.

The foregoing constitutes the Decision and Order of the Court.

Dated: April 22, 2019
Goshen, New York

ENTER,

Hon. Maria S. Vazquez-Doles, J.S.C.

To: Counsel of record via NYSCEF.