Franco Belli Plumbing & Heating & Sons, Inc. v Citnalta Constr. Corp.
2020 NY Slip Op 33953(U)
December 2, 2020
Supreme Court, New York County
Docket Number: 107725/2011
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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FRANCO BELLI PLUMBING & HEATING & SONS, INC.,

Plaintiff,

- v -

CITNALTA CONSTRUCTION CORP., TRAVERLERS CASUALTY AND SURETY COMPANY OF AMERICA, AND NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY.

Defendants.

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INDEX NO. 107725/2011

MOTION DATE N/A

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 192, 193, 194, 195, 197, 198, 199, 200, 201, 202

were read on this motion to FIX DAMAGES AND PRE-JUDGMENT INTEREST AFTER TRIAL.

This case arises from the construction of a high school in Manhattan. Plaintiff Franco Belli Plumbing & Heating & Sons, Inc. ("Plaintiff") performed plumbing work on the construction project under a subcontract with Defendant Citnalta Construction Corp. ("Citnalta"), with a labor and material payment bond issued by Defendant Travelers Casualty and Surety Company of America ("Travelers") (together with Citnalta, "Defendants"). Plaintiff initiated this lawsuit in 2011, alleging that it was not fully paid for its work and asserting three causes of action seeking recovery (NYSCEF 3 [Compl.]). In November 2017, the matter proceeded to a four-day bench trial before Justice Eileen Bransten.

On November 30, 2018, the Court granted in part Plaintiff's claim for breach of contract, enumerating five categories of contract damages to which Plaintiff was entitled to judgment

(Post-Trial Op. at 48-49 [NYSCEF 175]).[1] In addition to the breach of contract claim, the Court also granted Plaintiff's second cause of action for recovery under the payment bond against Defendant Travelers, granted Plaintiff's third cause of action to foreclose its mechanic's lien, and granted Plaintiff's request for attorneys' fees (*id.* at 48-49). On appeal, the First Department reversed the award of attorneys' fees but otherwise affirmed the Court's judgment (*Franco Belli Plumbing & Heating & Sons, Inc. v Citnalta Constr. Corp.*, 180 AD3d 498 [1st Dept 2020]).

On remand, the parties seek to tie up several loose ends. Defendants seek to fix damages for one aspect of Plaintiff's breach of damages claim (the "Additional Foremen Claim") — for which the Court did not calculate damages in its trial decision — at zero. Defendants also seek a ruling that prejudgment interest should be calculated from the date of the Court's trial decision rather than at the time of the conduct giving rise to the breach. Plaintiff, for its part, cross-moves to fix the damages award for the Additional Foremen Claim at $73,253.71, to calculate prejudgment interest on its total contract damages from December 31, 2008 (except for one component, the retainage fee, which Plaintiff argues accrued from May 14, 2012), and to award attorneys' fees.

For the reasons set forth below, Defendants' motion is denied and Plaintiff's cross-motion is granted in part and denied in part.

[1] The Court held that Citnalta failed to (1) "remit the retainage fee to Plaintiff", (2) "pay for the bond premium", (3) "pay the on-site overtime premium from October 2007 through August 2008", (4) "pay for additional foremen from May 22, 2008 through August 2008", and (5) "pay for the additional work performed to re-route the roof drainage pipes" (*id.* at 48).

DISCUSSION

A. Damages for the Additional Foremen Claim

The branch of Defendants' motion seeking to fix damages for the Additional Foremen Claim at zero is denied. In the absence of explicit direction from the trial court on calculating damages for the Additional Foremen Claim, the Court must decide between the parties' competing proposals by determining which approach is consistent with the trial court's decision as written.

Defendants' motion is denied because its position contradicts the Court's ruling. The Court held that "**[j]udgment shall be entered** in favor of Plaintiff Franco Belli Plumbing and against Defendant Citnalta on Plaintiff's claim for breach of the Subcontract arising from **Citnalta's failure to . . . pay for additional foremen from May 22, 2008 through August 2008**" (Post-Trial Op. at 48 [emphasis added]). Elsewhere in the opinion, the Court underscored that Plaintiff "established entitlement to damages for its additional foremen claim . . . plus interest" (*id.* at 38). These unambiguous statements make apparent the Court's view – based on the record before it – that an obligation existed to pay for additional foremen during the May-August 2008 period, that Citnalta failed to fulfill that obligation, and that Plaintiff was entitled to damages. Certainly neither statement supports the conclusion urged by Citnalta that Plaintiff "is entitled to zero damages" (NYSCEF 190 at 7 [Defs.' Br.]). To the contrary, if the Court had found that Plaintiff incurred no costs for additional foremen, then Citnalta could not be found to have "fail[ed] to . . . pay" "for additional foremen." And if Plaintiff was being awarded nothing for this claim, the Court need not have specified that Plaintiff was being awarded nothing "plus interest."

Hemmed in by the Court's unambiguous holding, Defendants are left to argue that the holding was wrong. To that end, Defendants try to re-litigate the evidence adduced at trial, contending that certain evidence – purportedly showing that there were no "additional" foremen during the relevant period — validates an award of zero damages (*see* NYSCEF 190 at 3-5). But this motion, brought within the narrow confines of CPLR 5001, cannot serve as a vehicle to reargue portions of the trial court's decision or to raise new arguments for the Court's consideration. Defendants were able to pursue those theories on appeal, but either failed to do so or were unsuccessful. As a result, Defendants' motion to fix damages on the Additional Foremen Claim at zero must be denied.

Plaintiff's cross-motion to set the amount of damages for the Additional Foremen Claim at $73,253.71 is granted because it accords with the language of the Post-Trial Opinion. The Court referred to the "claim for additional foremen" or "additional supervision claim" by referencing Plaintiff's Trial Exhibit 30 (*see* Post-Trial Op. at 20, 38). That exhibit, an Acceleration Change Order, showed the "Foreman average rate of pay," which Plaintiff now extrapolates for the relevant time period to reach a sum total of $73,253.71. While the trial court whittled down Plaintiff's Additional Foremen Claim – limiting the claim in duration and in scope – the court did not express doubt as to the veracity of the figures in Exhibit 30. Therefore, by applying the calculations in Exhibit 30 to the claim as modified by the trial court, Plaintiff's proposal is consistent with the decision as a whole. The time for Defendants to argue that Exhibit 30 was not the correct source to calculate damages for this claim has long passed.

B. Pre-Judgment Interest

Next, the branch of Defendants' motion seeking to compute pre-judgment interest on Plaintiff's contract claim from the date of the trial court's decision – essentially, to award no pre-

judgment interest – is denied. "The plain language of CPLR 5001(a) 'mandates the award of interest to verdict in breach of contract actions'" (*J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117 [2012], citing *Spodek v Park Prop. Dev. Assoc.*, 96 NY2d 577, 581 [2001]). Under CPLR 5001, "[i]nterest shall be recovered" in an action for "breach of performance of a contract," and such interest "shall be computed from the earliest ascertainable date the cause of action existed." And "[w]here such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." Because Plaintiff prevailed on its claim for breach of the subcontract, it is entitled to pre-judgment interest under New York law as a matter of right.

Defendants maintain, however, that "[Plaintiff] should be entitled to no interest before" the date of the trial court's decision because the damages amount was not "ascertainable" until that moment, so Defendants "had no ability to make a tender to toll interest" (NYSCEF 190). That argument misunderstands the purpose of CPLR 5001. Pre-judgment interest "is not a penalty against defendant" (*Toledo v Iglesia Ni Christo*, 18 NY3d 363, 369 [2012]). Rather, "[t]he principle behind prejudgment interest is that the breaching party should compensate the wronged party for the loss of use of the money" (*J. D'Addario & Co., Inc.*, 20 NY3d at 117-118), in order "to make an aggrieved party whole" (*Spodek*, 96 NY2d at 581; *155 Henry Owners Corp. v Lovlyn Realty Co.*, 231 AD2d 559, 560 [2d Dept 1996] ["The award of interest is founded on the theory that there has been a deprivation of use of money or its equivalent and that the sole function of interest is to make whole the party aggrieved"]). "New York law does not hold . . . that prejudgment interest is due from the demand date or when damages become ascertainable" (*Stanford Sq., L.L.C. v Nomura Asset Capital Corp.*, 232 F Supp 2d 289, 292 [SD NY 2002]).

Indeed, Defendants' interpretation of CPLR 5001 would have the practical effect of precluding pre-judgment interest in almost all contract cases. As Judge Marrero observed in *Stanford Square*, "[i]n virtually all breach of contract cases, unless liquidated damages are specifically provided for, the quantum of damages is disputed," but "[t]he fact that damages are disputed by the parties does not defeat a party's right to prejudgment interest" (*id.*).[2]

Having determined that Plaintiff is entitled to pre-judgment interest under CPLR 5001, the Court now turns to fixing the date from which such interest should accrue. Plaintiff's cross-motion seeks to set that date as December 31, 2008, except for the retainage-fee component of damages, which interest Plaintiff proposes should run from May 14, 2012. This branch of the cross-motion is granted. As noted, CPLR 5001 provides that where contract damages "were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." The Court finds that December 31, 2008, when work on the project was completed (Post-Trial Op. at 22), serves as "a single reasonable intermediate date" for four of the five components of contract damages, which were tied to obligations that became due at various points during construction. Indeed, Plaintiff's proposed accrual date appears conservative in some respects – the trial court indicated, for example, that Citnalta failed to compensate Plaintiff for the on-site overtime premium for work completed by August 2008 (*id.* at 35). In any event, the December 31, 2008 date provides a reasonable, simplified accrual date in accordance with CPLR 5001. As for the other

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[2] The cases on which Defendants rely address prejudgment interest in the context of arbitration awards and therefore are inapposite (*see, e.g.*, *Dermigny v Harper*, 127 AD3d 685, 686 [2d Dept 2015] [holding that "pursuant to CPLR 5002, the defendant was entitled to prejudgment interest from the date of the arbitration award"]; *In re Gruberg (Cortell Group, Inc.)*, 143 AD2d 39 [1st Dept 1988] [noting "on a motion to confirm an arbitration award, if the award is silent on the question of prejudgment interest, a court is not entitled to award such interest"]).

component of contract damages – the retainage fee – interest on that portion accrued starting on May 14, 2012, at which point "Citnalta breached the Subcontract by failing to remit the retainage fee within seven days of the SCA's final payment for the Project" (*id.* at 27).

Therefore, the Court finds that pre-judgment interest shall accrue at the statutory rate on Plaintiff's contract damages from December 31, 2008, except for the final retainage balance of $26,363, which interest shall run from May 14, 2012.

C. Attorneys' Fees

Finally, the branch of Plaintiff's cross-motion seeking an award of attorneys' fees against Travelers under State Finance Law §137 [4] [c] is denied. Section 137 addresses the requirements for labor and materials bonds in public-improvement construction projects, which is relevant here because the work performed by Plaintiff and Citnalta was funded by the New York City School Construction Authority in order to build a new high school (*see* Post-Trial Op. at 41). Under §137 [4] [c], the Court may award reasonable attorneys' fees in a dispute over a payment bond when "it appears that either the original claim or defense interposed to such claim is without substantial basis in fact or law."

This is Plaintiff's second try at recouping attorneys' fees under §137 [4] [c]. The trial court held that Plaintiff was entitled to such fees because, among other things, "there [was] no basis in fact for Defendants' affirmative defense" that Plaintiff "failed to provide the requisite notice under the labor and material payment bond" (Post-Trial Op. at 45-46). As noted, the First Department reversed this portion of the trial court's decision, finding "upon reviewing the entire record, that it does not appear that the defense was without substantial basis in fact or law" (*Franco Belli Plumbing & Heating & Sons, Inc.*, 180 AD3d at 498).

Now, Plaintiff argues that Traveler's defense to paying pre-judgment interest is "blatantly frivolous" and "without any basis in law," warranting the award of attorneys' fees under §137 [4] [c] (NYSCEF 193 [Pl.'s Notice of Cross-Motion]). To begin with, the statutory remedy is available only if "**either the original claim or the defense interposed to such claim** is without substantial basis in fact or law" (§137 [4] [c] [emphasis added]). Plaintiff's "original claim" against Travelers sought payment of the subcontract balance under the labor and materials bond issued to Citnalta (Compl. ¶17). That claim, along with the defense that Travelers "interposed to such claim" (*i.e.*, the notice issue), has been fully litigated; recovery under §137 [4] [c] was barred. Because the arguments concerning pre-judgment interest do not constitute "either the original claim or the defense interposed to such claim," §137 [4] [c] is inapplicable.

Even if the statutory provision were applicable, the Court would decline to award fees here. Section 137 [4] [c] is about payment bonds (*see id.* ["In any action on a payment bond furnished pursuant to this section . . ."]). On this motion, Travelers' only defense to pre-judgment interest *under the payment bond* is that Plaintiff "never made a demand upon [T]ravelers" (NYSCEF 190 at 12). Defendants' other arguments to avoid pre-judgment interest, while meritless, have nothing to do with the payment bond. In seeking attorneys' fees under §137 [4] [c], Plaintiff conflates the two varieties of defenses. For instance, Plaintiff criticizes Defendants for relying on "two arbitration cases" in arguing against pre-judgment interest, but those cases are not part of Travelers' defense under the bond (*see* NYSCEF 195 at 3).

Therefore, the Court finds that Plaintiff has not shown entitlement to attorneys' fees under §137 [4] [c].

* * * *

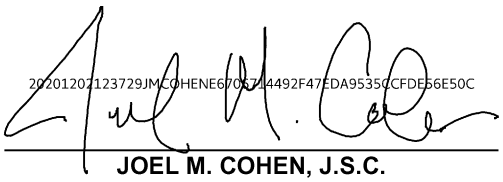
Accordingly, it is

ORDERED that Defendants' motion is **denied**; it is further

ORDERED Plaintiff's cross-motion is **granted** such that (i) damages for the Additional Foremen Claim is set at $73,253.71, plus interest, and (ii) pre-judgment interest at the statutory rate shall accrue on Plaintiff's contract damages from December 31, 2008, except for the final retainage balance of $26,363, which interest shall run from May 14, 2012; it is further

ORDERED that the branch of Plaintiff's cross-motion seeking an award of attorneys' fees under State Finance Law §137 [4] [c] is **denied**; and it is further

ORDERED that Plaintiff shall submit an order of judgment to the Court consistent with this opinion on or before December 10, 2020.



12/2/2020
DATE

JOEL M. COHEN, J.S.C.

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