Consumer Protection Restoration LLC v Hickory House Tenants Corp.
2020 NY Slip Op 35807(U)
March 15, 2020
Supreme Court, Rockland County
Docket Number: Index No. 031285/2018
Judge: Paul I. Marx

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. PAUL I. MARX, J.S.C.

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

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CONSUMER PROTECTION RESTORATION LLC and PRESTIGE REALTY GROUP INC.,

Plaintiff,

-against-

HICKORY HOUSE TENANTS CORP. and NATIONAL BILLING AND FUNDING LLC,

Defendants.

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Index No. 031285/2018

DECISION AND ORDER

Motion Date: Jan. 29, 2020
Motion Sequence ## 6 and 7

The following papers were read on: (1) the joint motion[1] of Plaintiffs Consumer Protection Restoration LLC ("CPR") and Prestige Realty Group Inc. ("Prestige") and Defendant National Billing and Funding LLC ("NBF") for partial summary judgment against Hickory House (Motion # 6); and (2) the motion of Defendant Hickory House Tenants Corp. ("Hickory House") for partial summary judgment against CPR and Prestige, dismissal of the mechanics' liens, award of attorney's fees, costs and disbursements and damages pursuant to the Lien Law (Motion # 7):

Plaintiffs' and NBF's Joint Motion for Partial Summary Judgment	NYSCEF Doc. 271-305
Hickory House Opposition to Joint Motion	Doc. 343-363
Plaintiffs' and NBF's Reply	Doc. 364-371
Hickory House's Motion for Partial Summary Judgment	Doc. 308-324
Plaintiffs and NBF's Opposition	Doc. 331-342
Hickory House's Reply	Doc. 372-373

BACKGROUND

This action arises from a fire which occurred on March 11, 2017 at the Hickory House co-operative housing complex located at 248-260 North Main Street in Spring Valley, New York (the "Premises"). The fire resulted in the complete destruction of Building A and connecting wing to Building B. On the date of the fire, the then president of Hickory House's board entered into

[1] Plaintiffs and NBF share the same principal, Wetzer Jeannot, and are represented by the same attorney.

separate contracts with CPR to perform hazardous demolition and mitigation services and with Prestige to perform demolition and construction services at the Premises.

Plaintiffs alleged that they performed the contract services from March 11, 2017 through January 19, 2018, when Hickory House demanded that they cease performing any work. Plaintiffs allege that Hickory House failed to pay them for their services, despite their demand for payment. CPR and Prestige each filed a mechanics' lien against Hickory House with the Rockland County Clerk and served Hickory House with notice of the liens.

Plaintiff filed the instant action against Hickory House and NBF alleging causes of action against Hickory House for breach of contract, unjust enrichment and anticipatory repudiation and to foreclose on the mechanics' liens. CPR seeks a judgment in the sum of $1,547,253.16 plus attorneys' fees and costs. Prestige seeks a judgment in the sum of $3,694,746.83 plus attorneys' fees and costs. Plaintiffs did not allege any claims against NBF, the mortgagee for the Premises. Plaintiffs named NBF as a party pursuant to § 44-2 of the New York Lien Law.

In its Answer, Hickory House alleged affirmative defenses and asserted counterclaims against Plaintiffs for: (1) willful exaggeration of lien amounts; (2) fraud in the inducement against CPR; (3) deceptive business practices against CPR pursuant to GBL § 359; (4) negligence against CPR and Prestige Realty in connection with the work they performed in the twelve units in Building B; (5) negligence against CPR and Prestige Realty in connection with their placement of a trailer over the water drain located in the parking lot alongside Building B; (6) tortious interference with contract in connection with Hickory House's mortgage previously held by Capital One; and (7) declaratory judgment that (a) the construction contracts with Plaintiffs are unenforceable due to missing essential terms and lacking a meeting of the minds, and (b) the assignment of Hickory House's insurance claims is null and void.

Hickory House alleged a cross claim against NBF seeking declaratory judgment that (a) NBF, CPR and Prestige Realty are each jointly and severally liable for any judgment Hickory House obtains against CPR or Prestige Realty, (b) NBF is not entitled to hold the insurance proceeds payable under Hickory House's insurance policy, or such proceeds shall be applied to pay off Hickory House's mortgage with the balance of said funds being released to Hickory House, (c) NBF shall not charge Hickory House the default interest rate, because NBF, acting through its alter egos, CPR and Prestige Realty, caused Hickory House's default, and (d) the pay-off amount of the mortgage shall be the amount which Hickory House owed to Capital One on January 8, 2018, less any reduction in principal to which Hickory House is entitled.

Plaintiffs and NBF filed a joint "Answer to Counterclaims and Cross Claim" (NYSCEF Doc # 224) in response to Hickory House's counterclaims against Plaintiff and cross claim against NBF. The joint reponse alleged nine affirmative defenses but no cross claims were alleged by NBF against Hickory House.

NBF acquired the loan and mortgage on the Premises from Capital One and commenced a separate action against Hickory House to foreclose on the note and mortgage. That action was settled.

Plaintiffs move for partial summary judgment against Hickory House on their breach of contract cause of action. NBF moves for partial summary judgment against Hickory House on NBF's "claims" for default interest and legal fees arising from its foreclosure action.

Hickory House moves for partial summary judgment against Plaintiffs, dismissal of the mechanics liens, attorney's fees, costs and disbursements and damages under Lien Law § 39.

DISCUSSION

<u>NBF's Motion for Partial Summary Judgment against Hickory House</u>:

NBF moves for partial summary judgment on its "claims for default interest and legal fees against Hickory House" in this mechanic's lien foreclosure action by Plaintiffs against Hickory House, wherein NBF was made a defendant because it "is the lienholder by way of the mortgage on the [Hickory House] Property".

Wetzer Jeannot, NBF's principal, claims that "HH owes NBF the default interest, servicing fees, attorneys' fees and the costs and expenses associated with [the Interpleader Action,[2] the Foreclosure Action, and the Lien Foreclosure Action]." Affidavit of Wetzer Jeannot dated November 22, 2019 at ¶ 46 (NYSCEF Doc # 272).

NBF does not have a claim against Hickory House in this action for default interest and legal fees. NBF did not cross claim against Hickory House and it did not preserve any claim for

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[2] An interpleader action was filed by Hickory House's insurance company, which issued proceeds on Hickory House's fire claim, in Nassau County Supreme Court. The company sought to deposit the insurance proceeds into court and allow the interested parties to determine which of them was to receive the funds. The action concluded with the proceeds being used to fund Hickory House's settlement with NBF of the foreclosure action in this Court.

such relief asserted against Hickory House in the foreclosure action. NBF asserts that the issues regarding pre-payment interest, default interest and legal fees were merged into this action when the mortgage foreclosure action was settled. They assert that the Court directed them to draft a stipulation to that effect. The stipulation they point to contains the captions of the two cases, which were never joined or consolidated, but it does not state that those claims will be addressed in this action. Affirmation of Craig A. Saunders, Esq. in Support of Motion, Exhibit 9 (NYSCEF Doc # 286). Hence, NBF did not preserve the issue.

Nonetheless, Hickory House alleged a cross claim against NBF in this action seeking a declaration that NBF shall not charge Hickory House the default interest rate because its default was brought about by NBF, acting through CPR and Prestige Realty. NBF may move for summary judgment on that cause of action to try to establish that Hickory House is not entitled to the relief it seeks. However, NBF would not be entitled to a judgment requiring Hickory House to make those payments even it succeeded on its motion. As NBF has no claim against Hickory House, it would not be entitled to a trial as to its damages, as Mr. Jeannot requests. Jeannot Affidavit at ¶ 54 (Doc # 272).

NBF deemed Hickory House to be in default of the note and mortgage and accelerated the debt after Hickory House made its second late mortgage payment in February 2018, shortly after NBF acquired Hickory House's mortgage from Capital One on January 8, 2018. NBF asserts that Hickory House defaulted in other ways, notably that Building A was not rebuilt in one year and is still not rebuilt. In addition, NBF cited the mechanics' liens as incidents of default of the consolidated mortgage. NBF claims that Hickory House violated its Consolidation, Extension, Modification and Security Agreement (the "Agreement") with Capital One, because it financed its insurance premium. NBF also claims that Hickory House is not properly insured, because it received the entire amount of its insurance policy.

Susan Smith, who was the new President of Hickory House's board when the January 2018 mortgage payment was due to NBF, acknowledged that the payment was late, citing the new board's inability to access Hickory House's bank accounts to make the payment. Ms. Smith explained that the old board did not cooperate with the new board to change signatories on the accounts. She further stated that the sale of Hickory House's mortgage by Capital One to NBF on January 8, 2018, adversely affected Hickory House's ability to timely make the January 2018 mortgage payment, as Hickory House had not received official notice of the sale to NBF. She notes that NBF could have arranged to continue the automatic payments from Hickory House's Capital One checking account to ensure its receipt of the payment. Ms. Smith stated that the February 2018 mortgage payment was timely sent but was received late, because the check was returned due to an incomplete mailing address. Ms. Smith contends that Section 1.05(A)(1)(b) of the Agreement merely provides that Hickory House's insurance premium "be paid annually in advance" and did not prohibit financing the payment. She argues that NBF should not be allowed to use mechanics' liens filed by its sister companies, CPR and Prestige Realty, and the failure of those companies to timely rebuild Building A, to justify alleged defaults by Hickory House.

NBF glosses over the fact that its principal is also the principal of CPR and Prestige Realty, which have created the conditions of Hickory House's purported default. NBF contends that the circumstances surrounding Hickory House's default are immaterial to the issue of its default and that Hickory House is bound by the terms of the note and mortgage and the Agreement it negotiated with Capital One. NBF overlooks that this Court is also a court of equity and the relief it seeks, which was initially asserted in the foreclosure action, is subject to principles of equity. NBF, through its principal acting in a different capacity, cannot create the circumstances of Hickory House's default and simultaneously profit by it. NBF has not established its entitlement to summary judgment on Hickory House's cross claim.

Accordingly, NBF's motion is denied.

<u>Plaintiffs' Motion for Partial Summary Judgment against Hickory House</u>:

Plaintiffs move for partial summary judgment against Hickory House on their breach of contract cause of action. Plaintiffs rely on *Karimian v Time Equities, Inc.*, 164 AD3d 486, 489–90 [2nd Dept], *leave to appeal dismissed*, 32 NY3d 1074 [2018], which stated that "[t]he essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach." (citing *Tri-Star Light. Corp. v Goldstein*, 151 AD3d 1102, 1105 [2nd Dept 2017]; *Hampshire Props. v BTA Bldg. & Developing, Inc.*, 122 AD3d 573, 573 [2nd Dept 2014]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2nd Dept 2010]).

Plaintiffs contend that they have established a breach based upon the unilateral termination of the contracts by then president of Hickory House, Susan Smith, without justification. Plaintiffs submit that the validity of the contracts were established by the affidavit of Doris Ford, former

President of Hickory House, who signed the contracts on March 11, 2017, and later had them ratified by the Board members.

Hickory House opposes Plaintiffs' motion, contending that the contracts are so ambiguous as to be unenforceable. Hickory House submits that the contracts were missing the essential elements required of a construction contract: (1) price; (2) scope of work and (3) time of performance. *See A & M Wallboard v Marina Towers Assoc.*, 169 AD2d 751, 751 [2nd Dept 1991]; *Cleveland Wrecking Co. v Hercules Const. Corp.*, 23 F. Supp. 2d 287, 292 (E.D.N.Y. 1998), *aff'd sub nom. Cleveland Wrecking Co. v Hercules Const. Corp.*, 198 F.3d 233 (2d Cir. 1999) (citing *A&M Wallboard, supra*). Hickory House asserts that the contracts were missing all three essential terms when they were signed. Neither of the contracts contained an agreed upon price at the time of signing; the prices were later written in by hand. The contracts did not provide any dates for the time for performance or define the scope of work. Hickory House asserts that the contracts explicitly stated that specifications for the work and materials would be prepared by Contractor and submitted to Hickory House for approval and would then become part of the contract. However, the specifications, Hickory House asserts, were not provided.

Hickory House additionally asserts that the contracts did not obligate it to make payments, as they expressly stated that "Contractor shall accept the proceeds of the Insurance less any fees and expenses paid to the public adjuster, in full payment for Contractor's services to be performed hereunder including work to be performed and materials to be supplied in repairing Damages." Further, the combined sum of the handwritten amounts for both contracts was $19,865,908.91, which far exceeded the total sum of Hickory House's insurance policies totaling $11,875,000.00.

Plaintiffs acknowledge that the contracts did not contain a price when they were signed by Doris Ford. Plaintiffs focus on ratification of the contracts by Ford, claiming that omission of the price at the time of signing is immaterial because the price was supplied later and was ratified. Plaintiffs do not address the other two elements of scope of work and time of performance.

In *166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 90–93 [1991], a case not cited by the parties, the Court of Appeals held that a missing contract term could be supplied where the contract stated within its four corners a methodology to determine the missing term; or the contract "invite[s] recourse to an objective extrinsic event, condition or standard on which the amount was made to depend." *Id.* at 92 (citing *Martin Delicatessen v Schumacher*, 52 NY2d 105, 110 [1981]). The Court of Appeals stated that while "[t]he doctrine of definiteness or certainty is well established in contract law", the Court "has not applied the definiteness doctrine rigidly". *Id.* at 91.

The principle laid out in *166 Mamaroneck Ave.* addresses the issue of the price being inserted after the contracts were signed. Another issue arises, however, regarding the fact that the contract prices were not determined in accordance with the stated methodology, *i.e.*, the insurance policy limits. The failure of the parties to adhere to the stated methodology for determining the price undercuts finding that the missing prices, which are essential terms, had been appropriately added.

A court will "enforce a contract if the parties have completed negotiations of essential elements, even when 'the parties have expressly left ... *other elements* for future negotiation and agreement'". *Aiello v Burns Int'l Sec. Servs. Corp.*, 110 AD3d 234, 243 [1st Dept 2013] (citations omitted and emphasis added). In this case, the contracts were missing essential terms regarding the scope of work and time of performance and the price did not conform to the methodology by which it was to be determined under the express language of the contracts. As a result, the contracts were not enforceable.

Accordingly, Plaintiffs' motion is denied.

Hickory House's Motion for Partial Summary Judgment:

Hickory House moves for partial summary judgment against Plaintiffs on their breach of contract cause of action, contending that a valid contract was not formed. Hickory House seeks dismissal of the mechanics' liens, attorney's fees, costs and disbursements and damages under Lien Law §§ 39.

As stated in connection with Plaintiffs' motion for summary judgment, the parties did not enter into valid and enforceable contracts because the contracts were missing essential terms regarding the scope of work and time of performance and the price was not properly determined in accordance with the methodology stated in the contracts. Therefore, Hickory House is entitled to summary judgment against Plaintiffs on their breach of contact cause of action.

Regarding Hickory House's request for dismissal of the mechanics' liens, Hickory House has established through the deposition testimony of Edward J. Silvestri that the liens were exaggerated because they were not based upon invoices and amounts paid. Instead, as Mr. Silvestri testified, "[t]he liens are based on the Xactimate profiles." Deposition Transcript of Edward J. Silvestri, Notice of Motion, Exhibit H, at 304:3-4. Mr. Silvestri explained that "[a]lls we put in

Xactimate is square footage numbers; the number, the dollar amount, is based on counties." *Id.* at 296:15-17. Mr. Silvestri was unable to produce invoices to subcontractors, provide proof of payment for work performed by subcontractors, to connect credit card payments to work performed at Hickory House, or to distinguish which items were attributable to work by CPR or Prestige or the materials provided to workers of each respective company for work at the Premises to support the amount of the mechanics' liens filed against Hickory House. Therefore, Hickory House has shown that Plaintiffs' mechanic's liens are exaggerated and must be dismissed.

Moreover, pursuant to Lien Law 39-a, Hickory House is entitled to recover damages and reasonable attorney's fees for securing the discharge of the liens "and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon." Proof of such damages shall be deferred to a trial of the action.

SUMMARY

It is ORDERED, that the motion of Plaintiffs and NBF for partial summary judgment is denied in its entirety; and it is further

ORDERED, that Hickory House's motion for partial summary judgment is granted. Plaintiffs' cause of action for breach of contract is dismissed. Hickory House has established its counterclaim for willful exaggeration of lien amount, thereby warranting dismissal of the mechanics' liens; and it is further

ORDERED, that Hickory House may recover damages and reasonable attorney's fees for securing the discharge of the liens in an amount to be determined at trial; and it is further

ORDERED, that the Clerk is directed to expunge the mechanics' liens filed by Plaintiffs Consumer Protection Restoration LLC and Prestige Realty Group Inc. against Hickory House Tenants Corp.

The foregoing constitutes the Decision and Order of the court.

Dated: March 25, 2020
New City, New York

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HON. PAUL I. MARX, J.S.C.