

**Five Star Elec. Corp. v A.J. Pegno Constr. Co., Inc.**

2021 NY Slip Op 30888(U)

March 19, 2021

Supreme Court, New York County

Docket Number: 400897/2011

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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FIVE STAR ELECTRIC CORP.,

Plaintiff,

- v -

A.J. PEGNO CONSTRUCTION CO., INC./ TULLY
CONSTRUCTION CO., INC., A JOINT VENTURE, TULLY
CONSTRUCTION CO, INC., A.J. PEGNO CONSTRUCTION
CO., INC.,

Defendant.

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INDEX NO. 400897/2011

MOTION DATE 02/09/2021,
02/09/2021

MOTION SEQ. NO. 007 008

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 559, 560, 561, 562,
581, 592, 593

were read on this motion to/for PRECLUDE

The following e-filed documents, listed by NYSCEF document number (Motion 008) 563, 564, 565, 566,
567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 582, 583, 584, 585, 586, 587, 588, 589,
590, 591

were read on this motion to/for MISCELLANEOUS

Motions decided as set forth on the record (3/10/2021 and 3/18/2021, M. Martinez, Ct. Rep.).

With respect to the defendants' argument that the court should strike paragraphs 24-26, 30-31
and 37 in the plaintiff's expert's affidavit (NYSCEF Doc. No. 567) or, in the alternative, order a
Frye hearing because the affidavit shows an improper reliance on bid estimates in the calculation
of damages, such request is denied. Defendants contend that the plaintiff's expert, Vincent
Riverso, improperly relies on the plaintiff's pre-bid estimate and deducts that amount from
plaintiff's alleged total labor cost (see NYSCEF Doc. No. 538, ¶¶ 24-26) and argue that using
pre-bid estimates to measure damages for labor inefficiency in this way is impermissible.

However, the plaintiff's expert is not using bid estimates to calculate its lost profits based on the purported reasonable value of services rendered, which *would* be inherently unreliable. Rather, the claim here is that the defendants caused the plaintiff delays and the contract price, which was agreed to include bid estimates as to anticipated hours, are simply a *part* of the analysis for how much time the work was reasonably anticipated to take for the purposes of calculating the delay damages allegedly caused by the defendants.

The cases cited by the defendants do not suggest that this is improper. For example, in *Naijar Indus., Inc. v City of New York*, the plaintiff's *principal* who was offered as his own expert in the case put forward two alternate theories of damages based on *two difference estimates* of the fair and reasonable value of the work actually performed, and then deducted the amounts actually paid in order to arrive at his quantum meruit damages. The Court held that under the circumstances of that case the estimates were “computations of a subjective nature by the bidder rendering such estimated costs unauditable’ by the public authority” and thus unreliable (87 AD2d 329, 332 [1<sup>st</sup> Dept 1982]). In *Whitmyer Bros. v State of NY*, the Third Department held that the plaintiff was entitled to recover the difference between the direct job costs and the sums paid for the work thus far and not a greater sum based on its bid estimates (63 AD2d 103, 108 [3d Dept 1978]). In *Novak*, which the defendants raised for the first time at oral argument (3/18/2021), the plaintiff sought to prove its excess labor costs by comparing the total labor costs for the project with the bid estimate for labor. The Third Department held this was “improper due to the inherent unreliability of price elements of a bid as well as the fact that not all of the delays can be attributed to the fault of defendant” (116 AD2d at 892). This, as discussed above, however is not the basis for plaintiff's damages claim.

Rather, the plaintiff's damages claim is based on "only the difference between its actual costs and what it was paid by NYCDEP bas[ed] on the labor hours included in its contract as reflected in the manpower loaded CPM that was used by NYCDEP as the basis of payment" (NYSCEF Doc. No. 591 at 17).

Nor is a *Frye* hearing warranted. It is clear that Mr. Riverso's testimony is based on principles that are "sufficiently established to have gained general acceptance as reliable" and the basis for his conclusion is not novel (*Sadek v Wesley*, 117 AD3d 193, 201 [1<sup>st</sup> Dept 2014] [quotations and citations omitted]). Nothing about Mr. Riverso's testimony is based on any experimental processes or controversial procedures. Mr. Riverso utilized a modified total cost method of calculating damages, which is neither new nor experimental (*see Whitmyer Bros. v State of NY*, 47 NY2d 960 [1979] [claimant seeking reasonable value of work performed "entitled to recover damages measured on a quantum meruit basis: to wit, actual job cost plus allowance for [] overhead and profit minus the amounts thus far paid" for said work]).

Finally, the court notes that the cases cited by defendants are also all post-trial cases, and do not consider by way of a motion *in limine* what may be put forward in support of a party's theory of damages *in advance of trial* (*see Naijar*, 87 AD2d 329; *Manshul Constr. Corp. v Dormitory Auth. of the State of NY*, 79 AD2d 383 [1<sup>st</sup> Dept 1981]; *Novak*, 116 AD2d 891; *Whitmyer Bros.*, 63 AD2d 103; *Mount Vernon Contracting Corp. v State of NY*, 56 AD2d 953 [3d Dept 1977]).

Accordingly, the court declines to strike the above paragraphs of Mr. Riverso's affidavit.

The parties are directed to order the transcript(s) and upload to NYSCEF and notify the court when transcripts have been uploaded.



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3/19/2021

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: