

Newland Constr., Inc. v 308 Eighth Ninth, LLC
2021 NY Slip Op 32700(U)
December 16, 2021
Supreme Court, New York County
Docket Number: Index No. 160426/2017
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR ENGORON PART 37

Justice

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NEWLAND CONSTRUCTION, INC.,

Plaintiff,

INDEX NO. 160426/2017

MOTION DATE 09/17/2021

MOTION SEQ. NO. 004

- v -

308 EIGHTH NINTH, LLC, ABC COMPANIES, JOHN DOES

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing papers, the instant motion for summary judgment by defendant 308 Eighth Ninth LLC is granted in part and denied in part, and the instant cross-motion by plaintiff Newland Construction, Inc. is also granted in part and denied in part.

The Construction Contract

As a practical matter, all the parties can agree on is that on or about July 30, 2015 (six years ago) they entered into a written contract (“The Agreement”) pursuant to which plaintiff was to act as general contractor for the renovation of the interior of the residential apartment building located at 308 West 18th Street, New York, NY (“The Building”), which defendant owns. The Agreement obligated plaintiff to complete all work by February 3, 2016, with liquidated damages of \$1,000 per day thereafter. Plaintiff was to furnish materials for and to install, inter alia, (1) two new steam boilers and connections to natural gas service supplied by Consolidated Edison, Inc. (“Con Ed”); (2) new heating pipes, return pipes, radiators, and associated equipment in the common areas and in the residential units in The Building; (3) fire suppression water sprinklers in the basement; and (4) two new gas-fired clothes dryers. Defendant was to provide certain materials, including certain air conditioning units. Of course, The Agreement contains lots of “boiler plate” language (pun intended) not particularly relevant here.

Defendant’s Basic Claims

On or about April 1, 2016, the New York City Department of Buildings (“DOB”) inspected plaintiff’s work at the time that the two new boilers were not supplying heat for The Building and issued “sign-offs” for that work. Plaintiff was still doing required follow-up work at around that time.

Defendant also claims that in late October 2016, it began receiving complaints from its tenants about the smell of gas in the Building. Upon inspection by the New York City Fire Department (“FDNY”) and by DOB a natural gas leak was detected in the basement of the Building in the area around the two Con Ed gas meters and the two new boilers. At that time, DOB ordered that physical “locks” be placed on both Con Ed gas meters, which turned off all natural gas service to The Building and rendered the two new boilers inoperable, ending heat and hot water in The Building for a time.

On or about November 1, 2016, DOB issued a violation against the Building based on the natural gas leak they had detected and for a lack of required water sprinklers in the basement.

Defendant also claims that on or about October 27, 2016, it notified plaintiff, by telephone, that there was a natural gas leak in The Building; and that on or about November 2, 2016, it notified plaintiff, by email, that the two Con Ed gas meters had been ordered “locked” by DOB on November 1, 2016, on account of a natural gas leak. Plaintiff thereafter sent its plumbing subcontractor, C&T Plumbing & Heating (“C&T”), to The Building to attempt to repair or otherwise remediate whatever was causing the alleged natural gas leak in the basement. Sometime in February of 2017, plaintiff was able to get the “locks” removed from the two Con Ed gas meters without first resolving the violation DOB had issued against the Building at the beginning of the prior November. Thereafter, C&T was able to get the two boilers it had installed in The Building restarted temporarily. However, from February through March of 2017, those boilers repeatedly broke down or malfunctioned.

On or about April 17, 2017, DOB resolved the violation it had issued against The Building.

Defendant also claims in November of 2017, defendant hired AAA Total Plumbing Inc. (“AAA”) to replace the two boilers plaintiff had installed, but to do no work on the remainder of the heating system plaintiff had installed in The Building. Plaintiff never reimbursed defendant for the \$18,000 it paid AAA for its remediation work. The work done by AAA finally eliminated the reliability and performance problems with the two boilers Plaintiff had installed. Since at least April of 2017, The Building has suffered and is continuing to suffer from loud knocking sounds in the steam pipes that plaintiff installed, including in the walls of the residential units. Plaintiff does not materially dispute that it never did anything to attempt to remediate or eliminate those noises.

Plaintiff’s Basic Claims

Plaintiff claims that certain of the materials that defendant was obligated to supply arrived late; that defendant sought certain changes in the contract in February and March of 2016; that when plaintiff finished its work, all gas piping was approved and passed inspection by DOB; that by April 1, 2016, all plumbing and electric work was approved and passed inspections by DOB and The Building was tendered to defendant.

Plaintiff also claims, without contradiction, that defendant has not paid the remaining \$64,432.00 of the contract price.

Plaintiff also claims that when its employees went to inspect the premises, they discovered that there were several people living illegally in the basement, that the boiler room was full of objects, and that the fresh air intake unit was covered and blocked.

Plaintiff also claims that there was no gas leak; that the gas-like smell emanated from a new radiator that, when heating up, had a paint-like smell that would ultimately dissipate; that the gas was turned off for the safety of the illegal occupants; that gas never leaked; that the parties agreed that plaintiff would do additional work in the basement, which plaintiff did, for additional money, which defendant never paid; that there is no need for a sprinkler system because the dryers were removed; that eventually all violations were dismissed and resolved; and that plaintiff owes \$64,432 under The Agreement and \$14,000 for the additional work.

On November 1, 2016, upon receiving a complaint from the illegal tenants, DOB issued three violations against the building: illegal occupancy, unauthorized partitions to create additional living space, and no sprinkler protection for the dryers.

Procedural History

Plaintiff commenced the instant action to recover the unpaid amounts under The Agreement, asserting claims for breach of contract, unjust enrichment, account stated, and foreclosure of a mechanic's lien. Defendant responded with a general denial, with 12 affirmative defenses, and with counterclaims for breach of contract, unjust enrichment, and negligence. Defendant now moves for summary judgment dismissing plaintiff's four causes of action and for summary judgment on defendant's breach of contract counterclaim. Plaintiff now cross-moves for summary judgment dismissing defendant's three counterclaims and for summary judgment on its claims.

Discussion

This Court must deny the dueling requests for summary judgment on the breach of contract causes of action because issues of fact exist as to whether plaintiff's work complied with The Agreement and was otherwise "up to snuff." The well-known elements for a cause of action for breach of contract are the existence of a contract; performance by the plaintiff; breach by the defendant; and damages to the plaintiff. The issues of fact here include, without limitation, whether gas leaked; if so, whose fault was it; whether the gas was shut off because of leaks or because of illegal occupants; whether the boilers plaintiff installed were defective; whether noise emanated from the pipes; and if so, was it plaintiff's fault.

Plaintiff makes one particularly interesting argument. It claims that because defendant states that the cause of the alleged defects can never be known, defendant has not made out a prima facie case for breach of contract. Interesting, but not totally persuasive. Plaintiff was contractually obligated to deliver working plumbing equipment. If it failed to do so, as defendant claims, defendant is not obligated to prove what plaintiff did wrong. However, plaintiff's argument is sufficient to defeat defendant's negligence counterclaim. Another impediment to this claim is that "A tort may arise from the breach of a legal duty independent of the contract, but merely alleging that the breach of contract duty arose from a lack of due care will not transform a simple breach of contract into a tort." Sommer v. Fed. Signal Corp., 79 NY2d 540, 551 (1992).

Plaintiff's and defendant's second causes of action, for unjust enrichment, are subject to dismissal because such claims cannot be maintained where a contract governs the parties' relationship.

Plaintiff's third cause of action, for an account stated, is subject to dismissal for several reasons, including that plaintiff has not submitted evidence of written accounts sent to defendant and because defendant's numerous complaints about the quality of plaintiff's work surely count as "objections."

Plaintiff's fourth cause of action, for foreclosure of a mechanic's lien, is not subject to dismissal but is not entitled to summary judgment, as at the end of the day, plaintiff may owe defendant money, rather than vice versa.

Conclusion

Thus, for the reasons stated herein, the motion for summary judgment by defendant 308 Eight Ninth LLC is granted to the extent of dismissing the second and third causes of action of plaintiff Newland Construction, Inc., only and is otherwise denied; and plaintiff's cross-motion is granted to the extent of dismissing defendant's second and third causes of action only and is otherwise denied; and the Clerk is hereby directed to enter judgment accordingly.

Plaintiff may proceed with its first and fourth causes of action; and defendant may proceed with its first cause of action.



<u>12/16/2021</u>			<u>ARTHUR ENGORON, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE