

Line Design LLC v Pro Design, Inc.
2022 NY Slip Op 30214(U)
January 20, 2022
Supreme Court, New York County
Docket Number: Index No. 652571/2011
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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LINE DESIGN LLC	INDEX NO.	<u>652571/2011</u>
Plaintiff,	MOTION DATE	_____
- v -	MOTION SEQ. NO.	<u>007 008</u>
PRO DESIGN, INC.,		
Defendant.	DECISION + ORDER ON MOTION	

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 318, 320, 322, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 363, 365

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 319, 321, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 362, 366

were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is

In motion 07, defendant Pro Design Inc. moves to (i) preclude the admission of plaintiff's allegedly fraudulent invoices as well as testimony from any witness based on these invoices which defendant insists are inadmissible evidence; and (ii) preclude the report of Indus Architects PLLC (IA) submitted by plaintiff to establish the value of plaintiff's deliverables at issue here and bar any testimony regarding this report.

In motion 08, plaintiff seeks to strike portions of the report by Greyhawk North America LLC¹ (Greyhawk) submitted by defendants: (1) to the extent that it contradicts

¹ Greyhawk states that it is a construction management and consulting firm retained "to evaluate the claims" in this action. Since evaluation of plaintiff's claims is the province of the factfinder, based on the actual content of the report, the court interprets the

the Joint Statement of Undisputed Facts; (2) Sections A and G should be stricken because they consist either of arguably (a) improper summation testimony about matters of ordinary comprehension such as intent or (b) improper legal conclusions about affirmative defenses of accord and satisfaction, estoppel, or the formation of a binding agreement; and (3) Section H should be stricken because Greyhawk failed to review plaintiff's deliverables and since it fails to give an opinion on the value of Line Design's work cannot criticize IA's report. Finally, plaintiff proposes that the court declare the appropriate formula to calculate damages.

In this 2011 action, plaintiff claims it is owed a balance of \$227,945.50 on its outstanding 22 invoices. The background of this case is set forth in the court's decision granting plaintiff summary judgment as to seven of the invoices and will not be repeated here except as relevant to this decision. (NYSCEF 188, Decision.)

Relevant to this decision is the Joint Statement of Undisputed Facts executed by the parties on August 31, 2018; a 20 a page document consisting of 147 paragraphs. (NYSCEF 309, Joint Statement.) Significantly, defendant admits that it accepted, used, and expected to pay for the deliverables at issue in this case. (*Id.*) The parties also agreed to an allocation of defendant's checks among the invoices at issue. (*Id.*) The Joint Statement was submitted with plaintiff's summary judgment motion.

In its decision granting summary judgment on liability to plaintiff, the court found the following issues of fact precluding summary judgment as to damages:

“whether defendant is entitled to the credits it claims for defective work/drawings/tickets; whether plaintiff's billed hours are reasonable as to all projects, particularly in light of issues of fact as to whether certain invoices were

purpose of Greyhawk's retention as to provide the industry custom and practice context for plaintiff's claims.

backdated; whether certain invoices were approved or objected to; whether defendant is entitled to a credit for plaintiff's rental of workspace; whether the hourly billing rates for the projects other than 7&9, OB, and MR are reasonable, and whether the printing rates for certain projects are reasonable."

(NYSCEF 314, Decision at 9.)

In motion 07, defendant asserts that plaintiff backdated invoices which should thus be precluded. This is an issue of fact appropriate for trial. It is for the trier of fact to determine the weight to be given to such evidence, if any. On the record, the court denied motion 07, but directed a brief deposition of plaintiff regarding a computer that allegedly became inoperable. (NYSCEF 366, Tr 22:7-16.) Likewise, defendant's motion to preclude IA from testifying at trial is denied. Defendant's objections go to the weight of IA's testimony and analysis. If defendant's attack on IA's methodology is accurate, then defendant will be successful at trial.

In plaintiff's motion in limine (08), plaintiff first challenges Greyhawk's statements that certain deliverables were unauthorized or rejected because (a) plaintiff performed additional work without following change-order procedures (b) plaintiff's initial proposal failed to account for certain project complexities or underestimated its work; or (c) plaintiff created cut tickets prematurely. (NYSCEF 308, Greyhawk Report, at 6-7, 11-12.) Plaintiff argues that these statements are contrary to defendant's admissions in the Joint Statement that it accepted the deliverables listed in the Joint Statement, used them to perform its work on these projects, and expected to pay for them.

In opposition, defendant repeats Greyhawk's observations in its report and thus fails to address the issue: whether the factual predicate for Greyhawk's report is defective. Nevertheless, the court denies plaintiff's request for the same reasons it denied the identical argument on the summery judgment motion. Greyhawk's

statements to which plaintiff objects are precisely the issues identified by the court as issues of fact. As to those invoices that plaintiff submitted for the first time years after the work was completed (Invoice 215, Falcone, Lagetko, Taubman and Humphrey), the court has also ruled that defendant may assert its estoppel and waiver arguments. (NYSCEF 283, October 21, 2019 Transcript 40:4-8.)

However, as to which of defendant's checks are to be applied to which invoices, the parties have come to an agreement in the Joint Statement. Greyhawk cannot now contradict that agreement. For example, Greyhawk states that a \$10,000 payment applies to the Humphrey Invoice 88 (NYSCEF 308 Richards Report at 11) , but the parties agreed in the Joint Statement to apply this payment (Check #55312 dated June 2, 2006) toward 88 Washington. (NYSCEF 308, Joint Statement ¶104(d).) Defendant shall strike from the Greyhawk report any statements concerning application of defendant's payments.

Next, plaintiff objects to Sections A through G of the Greyhawk's report because it includes matters of ordinary jury comprehension such as intent or improper legal conclusions about affirmative defenses of accord and satisfaction, estoppel, or the formation of a binding agreement.

An expert opinion is proper "when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." (*De Long v Erie Cnty.*, 60 NY2d 296, 307 [1983].) A jury "may be aided, but not displaced, in the discharge of its fact-finding function." (*People v Inoa*, 25 NY3d 466, 472 [2015].) Expert testimony that "overtakes the jury's function to decide matters within its unaided competence," however, is improper. (*Inoa*, 25 NY3d at 472.)

Therefore, in determining whether to admit expert testimony, the court must decide whether the jurors “would be benefited by the specialized knowledge of an expert witness” or whether they would be “able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge” without needing to hear from an expert. (*People v Cronin*, 60 NY2d 430, 433 [1983].)

Plaintiff seeks to strike Greyhawk’s conclusions that invoices 161, 162, 173 and 51 should be disregarded because of partial payment or a subsequent agreement to modify. To the extent Greyhawk opines on party intent, those statements will be stricken from the report and Greyhawk may not testify about intent. Defendant’s defense that a partial payment was made and accepted in full satisfaction of a disputed claim requires defendant to establish a “clear manifestation of intent by the parties” to do so. (See *Nationwide Registry & Sec., Ltd. v B & R Consultants, Inc.*, 4 AD3d 298, 299-300 [1st Dep’t 2004].) However, an expert may not give opinions about a party’s intent because the courts recognize that the factfinder is competent to draw these conclusions itself without the help of an expert. (*People v Lamont*, 227 AD2d 873, 875 [3d Dep’t 1996] [holding that investigator’s testimony about defendant’s intent improperly “tended to usurp the jury’s fact-finding function”].) Therefore, the words “and should be disregarded” shall be stricken from the Greyhawk report.

Plaintiff moves to strike Greyhawk’s statements concerning the Lindenbaum Residence that:

The signed proposal included the following [handwritten] edits by Pro Design:

- Requirement that Line Design request any information needed in a timely manner and in writing within seven (7) days from approval proposal
- Proposal accepted as a hard number

- Legitimate changes required to be submitted as a change order within three (3) business days from the date change occurs and is approved. Billing for changes not addressing per instructions would not be accepted.”

(NYSCEF 308, Greyhawk’s Report at 11-12.)

Plaintiff insists that defendant’s handwritten terms on the Lindenbaum proposal were a counteroffer. Greyhawk’s opinion presupposes that (a) both parties intended to treat these handwritten terms as binding, and (b) Line Design’s alleged violation of these terms absolves defendant of responsibility to pay. Both conclusions are improper and thus the above section will be stricken. Whether the parties agreed to such a modification is an issue of fact and not an appropriate topic for Greyhawk’s opinion.

In Section H of his report, Greyhawk evaluates the IA report. Greyhawk’s failure to inspect deliverables and to value plaintiff’s work goes to the weight to be given by the finder of fact to Greyhawk’s report and testimony. Therefore, the court reject’s plaintiff’s invitation to strike section H of the report.

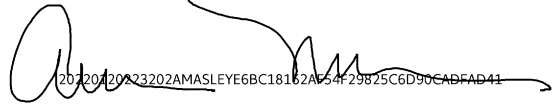
Finally, plaintiff asks the court to find that the appropriate formula for the calculation of damages is to multiply the reasonable number of hours by a reasonable hourly rate which should be the rate for such services in New York at the time the work was rendered. Defendant argues that the damage calculation should be based on actual costs incurred in preparing the work. Clearly an issue exists as to the appropriate measure of damages. Therefore, the court declines plaintiff’s invitation to select a damage formula prior to trial.

Accordingly, it is

ORDERED that defendant’s motion 07 is denied; and it is further

ORDERED that plaintiff’s motion 08 is granted, in part; and it is further

ORDERED that plaintiff shall file the note of issue within 10 days of the date of this decision.



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1/20/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

CHECK IF APPROPRIATE: