SA-FE Windows, Inc. v MJM Assoc. Constr., LLC
2022 NY Slip Op 33893(U)
November 15, 2022
Supreme Court, Kings County
Docket Number: Index No. 516913/2019
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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SA-FE WINDOWS, INC.,

Decision and Order
Plaintiff, Index No. 516913/2019

-against- November 15, 2022

MJM ASSOCIATES CONSTRUCTION, LLC, 10 JAY, LLC, 10 JAY PROPERTY, LLC, 10 JAY MASTER TENANT, LLC, SAFDI PLAZA REALTY, INC., WESTCHESTER FIRE INSURANCE COMPANY, JOHN DOES (1-10) and ABC CORPS. (1-10),

Defendants,
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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking partial summary judgement. The defendants oppose the motion. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

In February 16, 2016 the plaintiff entered into a contract with the defendant MJM Associates Construction LLC to perform window related construction at 10 Jay Street in Kings County. There is no dispute that ultimately the contract price was for $1,715,795.75. There is also no dispute the plaintiff was paid $1,378.925.52 for work actually performed. The plaintiff asserts there are no questions of fact they are owed the remaining $336,870.23 and seek summary judgement they are entitled to that amount. The defendants counter the plaintiff did not perform any work that would require payment for that additional amount and

the motion for summary judgement must be denied.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021).

Article 10.1 of the contract states that if it is determined the plaintiff has failed to perform its work in a proper manner and is terminated then another subcontractor will be hired to replace the plaintiff. In relevant part the Article states that "if the Trade Contractor's employment is terminated in accordance with this Trade Contract, it shall not be entitled to receive any further payment under this Trade Contract until the Work is wholly completed to the satisfaction of Construction Manager, Owner and the Architect. If the unpaid balance of the amount to be paid under this Trade Contract exceeds the cost and expense incurred by Construction Manager in completing the Work, this excess shall be paid to the Trade Contractor; but if the cost and expense of completing the Work exceeds the balance unpaid, then

the Trade Contractor shall pay and remain liable to Construction Manager for the difference" (see, Trade Contract [NYSCEF Doc. No. 40]). The plaintiff asserts that MJM only paid the replacement windows contractor $60,710 which is far less that the $336,870.23 still owed, therefore, the plaintiff is entitled to the difference, namely $276,160.23.

Article 10.1 states that it becomes operative "should the Trade Contractor fail at any time and in any respect to prosecute the Work with promptness and diligence, cause delay, disruption or interference with or damage to the Work, or any part of the Site, or any other work on the Project, or fail to supply sufficient number of skilled workers or a sufficient quantity of materials of proper quality, or fail to perform work of the quality required by the Contract Documents, or fail to perform any of its obligations under the Contract Documents, or abandon the Work" (id). Thus, according to the plain terms of the contract the plaintiff was permitted to abandon the work, in essence, fail to perform work, and still maintain the benefits of this article which allows the plaintiff to recover the difference of the contract price and the cost of an alternative subcontractor. The defendants present two reasons why this article cannot be a basis upon which to award summary judgement.

First, the defendants assert that Article 4 of the contract delineates the payment structure for work performed and the

necessity of presenting a statement of work performed. Thus, according to the defendants the provisions of Article 4 "reveal that in order for SAFE to be paid by MJM under the contract, SAFE was required to submit invoices for payment each month that reflected work that was actually performed by SAFE during the prior month" (see, Affirmation in Opposition, ¶17 [NYSCEF Doc. No. 47]). Thus, without evidence of work being performed the plaintiff is not entitled to any payment. However, clearly, no such evidence of any work performed is necessary where the contract itself contemplates payments for not performing the work efficiently or abandoning the work altogether. There can be no question of fact that payments sought pursuant to Article 10 do not require and in many instances cannot require evidence supporting the performance of any work.

Second, the defendants argue that application of Article 10 in the manner proposed by the plaintiff can lead to unjust and absurd results. The defendants insist that Article 10.1 is only operative where the subcontractor performs work "albeit poorly" (see, Affirmation in Opposition, ¶23). However, if the subcontractor performs no work at all then it defies common sense the subcontractor may still "collect on the difference of the entire contract price if the Construction Manager finds a cheaper replacement" (id at ¶25). Thus, the defendants contend that Article 10.1 only applies where the subcontractor has performed

work for which it has not been paid. The defendants argue that "had SAFE submitted invoices to MJM reflecting work it performed but was not paid for, it could be entitled, under section 10.1, for payment" (id at ¶26).

However, Article 10.1 is specifically triggers even where the subcontractor performs no work at all. As noted, the subcontractor may abandon the work and reap the benefits or drawbacks of such a decision. There is no requirement for the subcontractor to engage in some work, even inferior work, in order to be entitled to payment pursuant to Article 10. Moreover, if the subcontractor actually performed work and submitted an invoice for such work then the subcontractor would be paid pursuant to Article 4 not Article 10. Furthermore, there is no merit to the argument it is unjust to reward a subcontractor payment for work not performed. While this provision is unusual it has been duly negotiated by these sophisticated parties and there is no reason why the parties should not be entitled to the provisions for which they bargained. Thus, the plaintiff duly bargained for these provisions wherein they would be paid, even if they performed no work, if the replacement was paid less than what they were owed. There is noting unjust about enforcing contract terms according to their plain meaning. An alternative reading of this article wherein the subcontractor would not be entitled to any payments

unless they actually performed work could result in bizarre scenarios. For example, the owner or general contractor could hire a subcontractor pursuant to the contract and then continuously look for cheaper subcontractors and replace them without fear of owing the first subcontractor any compensation. Of course, the reasons outlined in Article 10 would have to be satisfied, however, there is no monetary incentive preventing an owner or general contractor from taking such actions undermining the good faith of all parties. The provision as written prevents any impermissible attempts to curtail the contractual agreement by requiring the owner or subcontractor to the pay the difference if any savings are realized. Further, it makes little sense arguing these provisions are operable where the subcontractor performed work in an inferior manner but not where they performed no work at all.

In any event, the court need to speculate about reasons for the provisions. As written, on their face, they permit the subcontractor to recover any difference where the second subcontractor has been paid less than the first. Therefore, based on the foregoing, the plaintiff's motion seeking summary judgement is granted.

So ordered.

ENTER:

DATED: November 15, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC