

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

2023 NY Slip Op 31402(U)

April 27, 2023

Supreme Court, New York County

Docket Number: Index No. 400897/2011

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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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 07/08/2022

MOTION SEQ. NO. 009

**DECISION + ORDER ON
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 752, 753, 758, 759, 760, 761, 762, 763, 764, 771, 772, 773

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT.

Upon the foregoing documents, Five Star Electric Corp.'s (**Five Star**) motion to modify judgment is granted and the Clerk of the Court is directed to enter a judgment in favor of Five Star in the amount of \$7,507,164, plus interest at the rate of nine percent (9%) from June 17, 2009 as discussed below.

Previously, following trial, this Court entered a judgment dated July 16, 2021 (the **Judgment**; NYSCEF Doc. No. 740) in favor of Five Star in the amount of \$19,318,671.

On appeal, the Appellate Division (i) vacated the Judgment to the extent that it awarded \$9,815,932 for additional labor cost damages, (ii) dismissed the claim for those damages, (iii) vacated the Judgment to the extent it awarded damages based on additional and extended general conditions, labor escalation, equipment and material escalation, and extended home office

overhead, and (iv) remanded those claims for a new assessment on the allocation of those damages (NYSCEF Doc. No. 746). The Appellate Division dismissed the claim for additional labor cost damages because Five Star's expert impermissibly used plaintiff's pre-bid estimate of the project expected labor costs:

That the contract provided for a lump-sum payment based on a reasonable bid amount, which in turn was purportedly based on plaintiff's internal estimates including labor costs, does not itself provide a sufficient basis to conclude that those internal estimates were accurate and reasonable for purposes of determining the number of labor hours for which plaintiff was to be paid under the contract. Accordingly, there was no reason to conclude that the internal estimates could properly be used as a basis for calculating the number of additional hours and associated labor costs plaintiff incurred due to any purported delays by defendants. As plaintiff failed to meet its burden of proving these damages with reasonable certainty, the claim for additional labor damages should be dismissed (*see City of New York v State of New York*, 27 AD3d 1, 9 [1st Dept 2005], *lv denied* 6 NY3d 711 [2006]).

However, under the circumstances, the trial court properly applied the modified total cost method to calculate the remaining delay damages that plaintiff sought, as the court properly credited plaintiff's expert's conclusions as to the amount of damages. Despite applying the proper method to calculate delay damages, the trial court improperly credited the expert's conclusion that defendants alone were responsible for the delay damages regardless of any delays also attributable to the City. Therefore, the remaining damage awards are vacated, and the matter remanded for a new consideration of the damages that are properly attributable to defendants' actions or lack thereof. This reassessment should properly weigh the delays and damages to plaintiff caused by defendants, after considering the delays attributable to the City

(NYSCEF Doc. No. 746, at 2-3).

Previously, the Court awarded 100% of the delay damages to Five Star based on the testimony that Pegno Tully was responsible for most of the delay damages. This the Appellate Division properly indicated was a mistake.

To establish entitlement to delay damages, the plaintiff must establish that the defendant was responsible for the delays, that there were no other independent causes of the same delays, that

plaintiff suffered damages as a result of these delays, and the plaintiff must furnish some rational basis for the Court to estimate those damages, although obviously a precise measure is neither possible nor required (*Plato General Constr. Corp. v Dormitory Authority of the State of New York*, 89 AD3d 819, 825 [2d Dept 2011], citing *Manshul Constr. Corp. v Dormitory Authority of the State of New York*, 79 AD2d 383, 387 [1st Dept 1981]).

Upon new consideration of damages, Five Star's expert witnesses credibly testified as to a critical path "window" analysis. In doing so, they (i) eliminated the potential concurrent delays that occurred during the relevant window as to critical path work and (ii) attributed 79% of the delay damages to Pegno Tully and 21% thereof to the City (NYSCEF Doc. No. 734, ¶ 18). Pegno Tully failed to prove otherwise. Accordingly, applying this 79%/21% apportionment, \$7,507,164 was attributable to Pegno Tully's delays and \$1,995,575 was attributable to the City's delays.

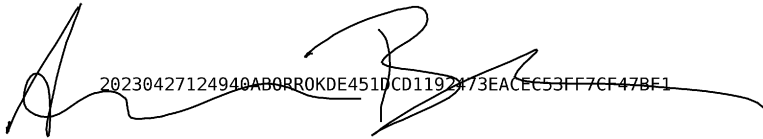
Pegno Tully's cross motion must be denied. As discussed above, Five Star has in fact met its burden in demonstrating the portion of delays attributable to Pegno Tully. To the extent that Pegno Tully argues that a limited discovery should be reopened to determine the damages amount, they are simply not entitled to it.

The Court has considered the parties remaining arguments and finds them unavailing.

It is hereby ORDERED that Five Star's motion (Mtn. Seq. No. 9) to modify the judgment dated June 17, 2021 is granted; and it is further

ORDERED that Pegno Tully’s cross motion to dismiss the remaining claims is denied; and it is further

ORDERED that the Clerk is directed to enter judgment for the plaintiff in the amount of \$7,507,164 plus interest at the rate of nine percent (9%) from June 17, 2009 to the date of entry of judgment, for a total of \$_____ on its breach of contract claim.


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4/27/2023
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: