

ZDG, LLC v 310 Group, LLC

2023 NY Slip Op 31771(U)

May 24, 2023

Supreme Court, New York County

Docket Number: Index No. 656537/2016

Judge: Laurence L. Love

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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. LAURENCE L. LOVE PART 39TR

Justice

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INDEX NO. 656537/2016

ZDG, LLC,

Plaintiff,

- v -

310 GROUP, LLC, NY MANHATTAN 40TH ST. LENDERS,
L.P., METAL PARTNERS REBAR LLC,TSC 2014,
LLC,CANY TECHNICAL SERVICES, LLC,MCLNY
PLUMBING & HEATING LLC,LEVERAGE BUILDERS
GROUP INC.,STRUCTURETECH, NEW YORK, INC.,JOHN
DOES 1 -10, BEING FICTITIOUS AND UNKNOWN TO
PLAINTIFF BUT INTENDED TO BE THOSE PARTIES
HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON
THE IMPROVEMENT KNOWN AS 310 312 40TH STREET,
NEW YORK, NEW YORK,

**DECISION/ORDER AFTER
INQUEST**

Defendant.

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In an Order dated August 9, 2019, this Court struck defendant, 310 Group, LLC’s (“310 Group”) Answer to the Complaint and Counterclaims and further dismissed 310 Group, LLC’s Third-Party complaint. On November 22, 2021, February 25, 2022, and April 7, 2022, this Court conducted an inquest in this matter, after which the parties were directed to submit post-inquest memorandums of law.

As described in plaintiff’s summons and complaint, filed December 15, 2016, and the amended complaint filed December 11, 2017 (defendant’s liability for which is conclusively established by the striking of defendant’s answer, *See Rokina Opt. Co. v Camera King, Inc.*, 63 NY2d 728 (1984); *Curiale v Ardra Ins. Co.*, 88 NY2d 268, 279 [1996]): On or about September 19, 2014, 310 Group was the owner of real property located at 310-312 West 40th Street, New York, New York (“Premises”). On or about September 19, 2014, Plaintiff, ZDG, LLC (“ZDG”) entered into a Construction Management Agreement (“CMA” or “Contract”) pursuant to which,

ZDG would provide construction management services to 310 Group in connection with the design and construction of a hotel on the Property. Pursuant to the CMA, all construction was to be performed by separate trade contractors and all payments to said trade contractors were the responsibility of 310 Group. On or about October 16, 2015, a trade contractor, Paramount Construction Services was terminated at 310 Group's direction, following the issuance of a stop work order by the DOB as a result of said trade contractor's having caused damage to the Property. On or about December 15, 2016, defendant terminated the CMA on the grounds of plaintiff's alleged default on same, resulting in the instant action. Said stop work order was lifted on or about December 5, 2015 and remediation work for same continued until March 2016. The concrete superstructure of the Property was substantially completed on August 11, 2016 and between September and December 2016, 310 Group was notified by ZDG on at least four occasions that over \$400,000.00 due to ZDG remained unpaid. The parties were unable to resolve said issues resulting in the issuance of a notice of termination by 310 Group to ZDG effective December 27, 2016. Arising from said facts, plaintiff asserts causes of action for (1) Breach of Contract, (2) Foreclosure of a Mechanic's lien in the amount of \$896,533.91, docketed on or about August 11, 2017, (3) Account Stated in the amount of \$681,718.59, (4) Indemnity for subcontractor's claims, and (5) Termination for Convenience.

Article 14 of the CMA discusses the parties' remedies upon termination of the CMA. CMA 14.1 governs termination upon events of default, pursuant to which 310 Group attempted to terminate the CMA. Pursuant to CMA 14.1.6 "If it shall be determined that a termination under this Section 14.1 was wrongful or unjustified, such termination shall then be deemed to be a Termination for the Convenience of Developer under Section 14.2, and the sole right, remedy and recourse of Construction Manager against Developer shall be governed and determined by Section

14.2.” As defendant’s pleadings were stricken, it necessarily follows that the termination was not for cause and damages must be calculated pursuant to CMA 14.2. Pursuant to CMA 14.2.2:

In the event of a Termination for Convenience pursuant to this Section 14.2, Construction Manager shall be paid by Developer for: (i) all earned but unpaid portions of the Construction Phase Fee and the General Conditions Lump Sum up to the date of the Termination for Convenience, less any sums properly deductible by Developer under the terms of this Agreement and, (ii) a termination fee of One Hundred and Fifty Thousand Dollars 00/100 (\$150,000.00). A termination fee of One Hundred and Fifty Thousand Dollars 00/100 (\$150,000.00) shall only apply if Termination for Convenience has been exercised by the Developer after Construction Phase (start of foundation) has commenced and before issuance of initial TCO. Developer shall have no liability to Construction Manager other than for the Construction Phase fee, General Conditions Lump Sum or, if applicable, the Termination Fee, or if applicable, actual costs incurred for work provided beyond the Estimated Project Duration.

Pursuant to CMA 5.1.1:

For services performed during the [the] Construction Phase and Post- Construction Phase defined in Section 2. 7 hereof, Developer will pay Construction Manager a lump sum fee of One Million One Hundred Thousand Dollars 00/100 (\$1,100,000.00) ("Construction Phase Fee") which shall be payable monthly based on the percentage of Work in place as will be reasonably determined by Developer, with retention of ten percent (10%) until the Work is fifty percent (50%) complete whereby retention shall be reduced to five percent (5%) withheld from each payment until Final Completion, with the remaining balance of the Construction Phase Fee payable as part of Final Payment. The Construction Phase Fee payments shall commence upon the first day of the month during which mass excavation commences. Notwithstanding anything to the contrary, Construction Phase Fee shall not increase for any reason whatsoever, including without limitation, if the Project is delayed or the scope of work changes or Change Orders are issued. Notwithstanding anything to the contrary, the Construction Phase Fee shall not exceed One Million One Hundred Thousand Dollars 00/100 (\$1,100,000.00) and shall not increase for any reason whatsoever.

Pursuant to CMA 5.2.1:

In addition to the Construction Phase Fee, Construction Manager shall be reimbursed on a lump sum basis for the General Conditions costs as and in the manner more particularly set forth in Exhibit H attached hereto and based upon the percentage of Work in place, as will be reasonably determined by Developer. The General Conditions shall be provided by the Construction Manager for the lump sum amount of Two Million Nine Hundred Fifty-Five Thousand Dollars and 00/100 (\$2,955,000.00) (hereafter referred to as the "General Conditions Lump Sum").

Pursuant to CMA 5.2.2:

The General Conditions Lump Sum are wholly based upon a thirty-two (32) month project duration, including six (6) months of Pre-construction Phase, twenty-five (25) months of Construction Phase prior to Substantial Completion, and one (1) month of Post-construction Phase closeout beginning immediately after Substantial Completion is obtained (together referred to as "Estimated Project Duration"). If the Construction schedule is extended beyond the Estimated Project Duration not due to the Construction Manager fault, the General Conditions shall be compensated in accordance with the actual costs incurred by the Construction Manager after the Estimated Project Duration has expired. Should any phase be shorter in duration than that allocated within the Estimated Project Duration, the Developer shall not be entitled to a credit except that the balance of the time anticipated for such Phase shall be credited towards any other Phase so that Developer shall not incur any further liability to Construction Manager for General Conditions if the actual time of all three Phases together does not exceed thirty-two (32) months.

Pursuant to CMA 5.2.3.2:

For the Construction Phase, the Construction Manager shall be paid from sums allocated within the General Conditions Lump Sum on a monthly basis for the first six and one half (6.5) months at a rate of One Hundred and Eighteen Thousand Dollars 00/100 per month (\$118,000.00) and thereafter will be paid based upon percentage work in place from start of foundation until the final month of the Post-Construction Phase as set forth within the Estimated Project Duration.

Plaintiff contends that it is entitled to recover the entirety of the Two Million Nine Hundred Fifty-Five Thousand Dollar General Conditions Lump Sum as it completed at least twenty-five

months of construction and is entitled to its actual costs incurred beyond the Estimated Project Duration. Plaintiff further contends that Plaintiff is entitled to payment for all “earned but unpaid portions...of the General Conditions Lump Sum up to the date of the Termination for Convenience.” Specifically, plaintiff testified that it actually incurred a total of \$3,527,629.51 in General Conditions costs over the twenty-seven months of the construction phase, comprised of \$779,840.25 in third-party general conditions; 1,767,191.91 in payroll; and \$980,597.35 in general overhead and administrative costs allocated to the Project, seeking same under Section 5.3.1 and 5.3.2 of the CMA. Functionally, plaintiff argues that the entire fee is due and earned simply by the passage of time.

Contrary to plaintiff’s argument, the testimony established that as of the date of termination of the CMA, fifty-five percent of the construction phase was completed and as such, fifty-five percent of the fee was earned at that point. Further pursuant to CMA 5.3 *et. seq.*, all of the third-party general conditions, payroll, and general costs are to be borne by plaintiff and deemed within the general conditions lump sum. As such, the total calculable damages to plaintiff are fifty-five percent of the General Conditions Fee, Construction Phase Fee, and Insurance Fee, respectively calculated as \$1,625,250.00, \$605,000.00, and \$499,235.00, together with the \$150,000.00 Termination for Convenience fee, totaling \$2,879,485.00, less payments made by 310 Group to ZDG totaling \$2,055,801.00, resulting in a recoverable amount of \$823,684. Plaintiff would be entitled to actual costs incurred for work provided beyond the Estimated Project Duration for the two months of additional work beyond same but did not present evidence of its additional General Conditions costs for those months, testifying only to total numbers for the entire project.

Plaintiff further seeks foreclosure of its mechanic’s lien, in the amount of \$896,534.00, filed August 11, 2017, as detailed in the Itemized Statement of Lien served upon Defendant.


Defendant argues that absent consolidation with the eleven other pending New York County mechanic's lien foreclosure actions pending in New York County pursuant to Lien Law §§ 43, 44 and 62. Defendant previously moved on the eve of the instant inquest to stay same and consolidate the instant action with said eleven lien foreclosure actions, which this Court declined to sign as untimely.

Pursuant to Lien Law § 44, necessary parties to the instant action to enforce a lien are “1. All lienors having liens notices of which have been filed against the same real property or public improvement, or any part thereof, prior to the filing of the notice of lis pendens in such action, where by law the filing of a notice of lis pendens is proper or required. 2. All persons having subsequent liens or claims against such real property, by judgment, mortgage or otherwise, filed, docketed or recorded prior to the filing of the notice of lis pendens, where by law the filing of a notice of lis pendens is proper or required. 3. All persons appearing by the records in the office of the county clerk or register to be owners of such real property or any part thereof.

Here, the sole the sole entity who filed a mechanic's lien against the property prior to the plaintiff herein is Leverage Builders Group, who is a party defendant. The lender for the project, N.Y. Manhattan 40th St. Lenders was party defendant and this action has been discontinued against same. All of the other lienors listed, SSG Door & Hardware, Inc; Construction Specialists, Inc.; World Wide Plumbing Supply, Inc.; Imperiox Construction, Inc.; Centrifugal Electric, LLC; KD Brothers, Inc.; City Safety Compliance Corp.; TSC 2014, LLC; Garvin Brown Construction Products, LLC; and Everest Scaffolding, Inc. filed their mechanic's liens well after August 11, 2017.

Pursuant to Lien Law §§ 43 and 62, the addition of the additional lienors is within the Court’s discretion. As this Court previously denied 310 Group’s motion, plaintiff’s mechanic’s lien may be adjudicated here. As such it is hereby

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant, 310 Group, LLC in the sum of \$1,720,218.00, with interest at the statutory rate from December 15, 2016, until entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk.

<u>5/24/2023</u>			
DATE			LAURENCE L. LOVE, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE