

Beasley Chin & Hunderman P.C. v 115-87 Owners Corp.

2024 NY Slip Op 31015(U)

March 26, 2024

Supreme Court, New York County

Docket Number: Index No. 656872/2020

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

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BEASLEY CHIN & HUNDERMAN P.C. d/b/a WJE
ENGINEERS & ARCHITECTS P.C.,

Plaintiff,

- v -

115-87 OWNERS CORP.,

Defendant.

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INDEX NO. 656872/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68 were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff’s motion for summary judgment is granted in part and denied in part.

Background

Plaintiff contends that defendant hired it to provide architectural services for a window installation project at the building defendant owns (defendant is a cooperative located on the Upper East Side). It observes that the contract included plaintiff overseeing the replacement of all of the windows from the 5th to the 33rd floors (about 900 windows) and possibly some windows on the 4th floor. It hired a separate contractor to do the actual window replacement.

Plaintiff points to paragraph 2 of the defendant’s rider to the parties’ agreement that details three tasks to be performed by plaintiff (NYSCEF Doc. No. 41 at 13-14 of 30). Task 1 included, essentially, preparation for the job to be performed; for instance, it included that plaintiff “prepare bidding documents” (*id.* at 13 of 30). Tasks 2 and 3 involved *inter alia* supervising the work, preparing drawings and overseeing change orders (*id.* at 14 of 30).

This portion of the agreement provided that plaintiff would be paid \$25,000 for task 1 and that the compensation for tasks 2 and 3 would be “determined in accordance with [the] Architect’s Proposal” (*id.* at 14-15 of 30).

Plaintiff acknowledges that it was paid in full for task 1 and for task 2. It points out that for task 3, defendant paid the first fourteen invoices it received from plaintiff (totaling just over \$100,000) but that the last six remain unpaid (amount to \$94,725.62). These invoices were sent between August 27, 2019 through January 16, 2020.

Plaintiff alleges that \$48,053.00 was for “testing of the existing window frames to confirm that the new windows and their connections to the existing frames had an adequate load path.” It observes that although the specifications it prepared for this job required the contractor to do this load testing, the contractor apparently indicated it could do this work and so plaintiff took on this obligation. Plaintiff admits that “it was outside of the scope of WJE’s Task 3 services in the Agreement” and that plaintiff had to design an apparatus to do these load tests.

Plaintiff contends that this work constituted “additional services” under the terms of the parties’ agreement and that, pursuant to the relevant provisions, it obtained consent in writing from defendant for this work. It includes an email chain which it claims shows that it obtained the necessary consent for the work from defendant’s managing agent (NYSCEF Doc. No. 45).

It argues that defendant did not immediately object to any of its invoices. Plaintiff points out that defendant’s managing agent sent an email on April 10, 2020 in which he claimed he would send over a \$25,000 check to plaintiff as a “good will payment.”

In opposition, defendant complains that plaintiff represented that the fees for task 3 would be \$72,000 and its overall estimated budget for the entire project would be \$103,000. It insists that plaintiff is now asking for over \$190,000 just for task 3. Defendant argues that

plaintiff improperly billed for field testing work as part of its task 3 invoices despite the fact that it should be part of task 1 (for which defendant paid plaintiff in full).

The president of defendant's board submits an affidavit in which he argues that defendant raised concerns with the bills submitted by plaintiff and attaches an email that he claims shows defendant has issues with the budget. Defendant also submits the affidavit of its consultant (NYSCEF Doc. No. 62), who claims that plaintiff billed about \$48,000 for anchor testing which should have been included as part of its task 1 fees.

In reply, plaintiff emphasizes that defendant only objected to the invoices after it filed a mechanic's lien and nearly six months after plaintiff stopped working on the job. It argues that defendant's objections are simply too late. Plaintiff also insists it is entitled to recover the legal fees incurred in bringing this action.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a

summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Account Stated

The question on an account stated cause of action is whether “plaintiff’s invoices were retained without any objection for a sufficient length of time as a matter of law to establish defendant’s liability on the account stated cause of action” (*Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 52, 786 NYS2d 155 [1st Dept 2004]). Here, the invoices were sent starting in August 2019 through January 16, 2020 (NYSCEF Doc. No. 43 [invoices]).

This Court’s task, then, is to ascertain when defendant first raised objections to these invoices and whether those objections were raised within a reasonable time (*Rosenman Colin Freund Lewis & Cohen v Edelman*, 160 AD2d 626, 559 NYS2d 249 [1st Dept 1990]). Defendant contends that it raised objections and its board president points to a November 2019 email and a separate April 2020 email chain.

The November 2019 email chain includes an email from defendant’s representative in which he notes that “That said, we are going to reduce the number of inspections going forward. Please do not schedule anymore inspections as this point. We have expended a considerable amount of funds over budget and I need to keep that in check, all while maintaining the integrity of the oversight of the installations” (NYSCEF Doc. No. 60). Defendant’s representative also observes that “Regarding scope, the Board has asked Mike Petermann (MPA) to cover the

payment applications, change orders, and the custom kitchen window issue since Mike is intimately familiar with the contract and the Board is most familiar with him” (*id.*).

The Court finds that this does not raise an issue of fact with respect to the account stated cause of action. Nothing in this email contains anything close to an objection to any of the invoices sent by plaintiff. Concerns about the “budget” is not the same as objecting to an invoice.

The April 2020 email chain contains an email from plaintiff’s employee in which she attempts to explain the rationale behind the billing (NYSCEF Doc. No. 61). This was preceded by an email from defendant’s representative in which he noted that “Next week I will have a check for \$25K as a good will payment. Quite honestly I’m sifting through the invoices and comparing it to the contract. Not an easy task. Let’s talk at the end of next week” (*id.*). The Court is also unable to find that this constitutes an issue of fact for the account stated cause of action. A promise to pay some of the outstanding amount and a request for assistance in going through the bills is not an objection sufficient to compel the Court to deny the instant motion.

Simply put, defendant did not raise any of the issues about which it now complains within a reasonable time after receiving the invoices. The fact is that this record supports plaintiff’s contention that defendant did not raise objections within a reasonable time; plaintiff insists defendant did not object to the bills and it was not until after plaintiff filed a mechanic’s lien in June 2020 that defendant challenged the amount due (*see* NYSCEF Doc. No. 4). That is not a reasonable time to raise such objections especially where defendant indisputably made partial payments for task 3 (*see Shea & Gould v Burr*, 194 AD2d 369, 371, 598 NYS2d 261 [1st Dept 1993] [finding that the failure to raise objections to a bill for five months gave rise to liability on an account stated claim]).

The Court recognizes that defendant raised many substantive objections about these bills in these papers, including that some of the work should have been covered under task 1 and that the amount far exceeded the estimates provided by plaintiff. But under an account stated cause of action, defendant was required to raise those objections within a reasonable time after receiving the invoices, not years later. And this record does not show that defendant raised any substantive objections to the invoices until many months after the last invoice was received. And it was not the invoices that prompted the objection; apparently, it was the filing of the lien.

The Court observes that by granting summary judgment on the account stated claim, plaintiff's causes of action for quantum meruit and unjust enrichment are moot. Moreover, the breach of contract claim is also moot but, as will be described below, only to the extent it applies to the fees requested in the invoices (it does not apply to the legal fees request).

Legal Fees

Plaintiff contends that it is entitled to legal fees under the terms of the contract. It argues that section 3(b) of the owner's agreement provided that compensation would be determined in accordance with an "Architect's Proposal." That proposal (included as exhibit A to the agreement) insists that "We propose performing the work outlined above in Tasks 1 through 3 for the fees and expenses listed in the tables below and in accordance with the attached Terms and Conditions for Professional Services dated October 1, 2009" (NYSCEF Doc. No. 41 at 25 of 30). The terms and conditions state, in pertinent part, that "Payment for WJE's services is expected in full in US dollars upon receipt of the invoice. Invoices more than 30 days past due are subject to a 2% interest charge per month (but no more than the maximum extent allowed by law) compounded annually and any related attorneys' fees and collection expenses" (NYSCEF Doc. No. 42, ¶ 5).

Defendant contends that the terms and conditions were not included as an exhibit to the signed contract. It insists that there is no basis to incorporate these terms and conditions into the parties' agreement on this record.

Plaintiff contends in reply that defendant accepted and agreed to the architect's proposal and that this proposal directly incorporated the terms and conditions.

The Court denies the request for legal fees on this motion as there are issues of fact with respect to whether defendant ever received these terms and conditions. Plaintiff's moving affidavit only insists that the terms and conditions were mentioned in the proposal (NYSCEF Doc. No. 38, ¶ 16). But this affidavit does not contend that these terms and conditions were ever sent and received by defendant or that defendant signed them.

Of course, that is the primary issue here—the terms and conditions were not included as an exhibit in the parties' agreement (*see* NYSCEF Doc. No. 41). The only two exhibits to the agreement were the architect's proposal (exh A) and the certificate of liability insurance (exh B). It is unclear from plaintiff's moving papers if defendant ever received these terms and conditions.

Defendant's affidavit in opposition does not directly refute that defendant received these terms and conditions, but the board president does assert that the terms and conditions were not included with the contract (NYSCEF Doc. No. 57, ¶ 29). Although plaintiff contends in reply that defendant acknowledged receiving the terms and conditions (NYSCEF Doc. No. 68 at 11), no citation is provided for this assertion.

The fact is that the terms and conditions were included as a separate document in this record and they were not signed by defendant. Nor is there any indication that defendant ever received them. That compels the Court to deny this branch of the motion as the Court is unable


to find as a matter of law that defendant is bound by a document that it may have never received. A trial is needed to ascertain the circumstances surrounding these terms and conditions and, therefore, whether plaintiff is entitled to legal fees.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted to the extent that it is entitled to summary judgment on its account stated cause of action and its mechanic’s lien foreclosure cause of action, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$94,725.62 plus statutory interest from November 5, 2019 (a reasonable midpoint of the invoices); and it is further

ORDERED that plaintiff shall upload a proposed order with respect to the foreclosure on a mechanic’s lien claim (along with a letter addressed to the court) on or before April 17, 2024; and it is further

ORDERED that the remaining branch of the motion (the legal fees) is severed and the case shall continue on that requested relief.

<u>3/26/2024</u> DATE			 <hr/> ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input 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
	<input type="checkbox"/> DENIED		