

Ho v Star Contrs., Inc.

2025 NY Slip Op 31348(U)

April 10, 2025

Supreme Court, New York County

Docket Number: Index No. 652769/2022

Judge: Melissa A. Crane

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

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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INDEX NO. 652769/2022

EDWARD J. HO, GWENDOLYN HO,

MOTION DATE 04/16/2024

Plaintiff,

MOTION SEQ. NO. 005

- v -

STAR CONTRACTORS, INC., LEONARD FUSHA, SUELA
LEKA, GRATIA CONTRACTORS, INC.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

This action arises out of a construction project (the "Project") on a residence (the "Brownstone"). Plaintiffs Edward J. Ho and Gwendolyn Ho are the owners of the Brownstone. They filed an amended verified complaint (the "Complaint") in this matter containing two causes of action: (1) breach of contract and (2) fraudulent conveyance. On August 31, 2023, defendants Star Contractors, Inc. A/K/A Five Star Euro Construction Corp., Leonard Fusha and Suela Leka, who were the general contractors on the Project, filed a verified answer to the amended verified complaint (the "Answer") asserting a counterclaim for breach of contract seeking to recover both the unpaid contract balance of \$691,191 and an additional \$146,500. Plaintiffs have never moved for an injunction per their second cause of action for fraudulent conveyance.

After protracted discovery, plaintiffs filed this motion for summary judgment. The court first heard oral argument on September 4, 2024. During the initial oral argument, defendants

argued that they were prejudiced by a prior court order that was intended to punish plaintiffs for their failure to appear for depositions. The court, in addition to precluding plaintiffs from testifying, had also precluded plaintiffs' architect from testifying. This was because plaintiffs had insisted on being present for those depositions and then were unreasonably unavailable. (*see* discussion on decision and order on motion 4 [EDOC 329]).

However, at oral argument on this current motion defendants argued that, rather than punishing plaintiffs for their recalcitrance, precluding the depositions of professionals, like the architect, hampered defendants' ability to put on a defense. Therefore, the court allowed discovery to reopen for the depositions of plaintiff's architect and designer to take place to be followed by supplemental briefing. Now that those depositions and supplemental briefing have taken place, the court renders its decision.

UNDISPUTED FACTS

It is undisputed that defendants began working on the Project in or around September 2020. To that point, the agreement between the parties required defendants to complete the Project substantially within 270 days, or by May 31, 2021 (Agreement, Article 2 [EDOC 252]). However, progress became delayed because of stop work orders from the Department of Buildings (the "DOB"). The cause of these Stop Work Orders were violations due to defendants' failure to comply with the New York City Building Codes.

For example, one stop work order was issued enjoining work on the rear façade of the building, because defendants never erected the scaffold properly or obtained the necessary scaffolding permit (*see* Exhibits O and P to Affidavit of James Hofrichter, [Hofrichter Aff. [EDOC 248] sworn to April 16, 2024; Deposition of John Reimnitz ("Reimnitz Dep.") [EDOC 305] pgs 176-177). The stop work order concerning the rear façade was issued in July 2021 and

was not rescinded until July 22, 2022. But, even the rescind order in July of 2022 left restrictions in place. It says, “no facade work” and “no work new staircase at basement” (*see* the Supplemental Affirmation of Dean Cho dated October 30, 2024 [Cho Supplemental Aff.] Ex E [EDOC 326]).

Although not part of plaintiffs’ initial motion papers, the deposition of plaintiffs’ architect, John Reimnitz, lends support that a stop work order also was issued concerning a new bulkhead that was to provide access from ground level to the cellar level. The stop work order was originally in place because defendants’ excavation was improper (Reimnitz Dep. 174-175; *see also* Cho Supplemental Aff. Ex E [EDOC 326]). Finally, plaintiffs contend that defendants failed to build a required construction fence correctly and to obtain the necessary permitting for it (Reimnitz Dep. pgs 71-73; Hofritcher Aff. Exs O and P).

Plaintiffs also complain that defendants further delayed the project by deviating from approved plans and failing to cure problems with their work. For example, defendants installed walls in the wrong location (Deposition of Sarah Blank sworn to October 10, 2024 [EDOC 323] (Blank Dep.) pgs 14, 26, 52) and their installation of structural beams was faulty (Reimnitz Dep. pgs 235-236). The incorrect work led to failed inspections with DOB. It is undisputed that, despite the stop work orders that were defendants’ responsibility to rectify, work did continue on the Project in other areas, such as the kitchen.

In January 2022, defendants presented plaintiffs with “Change Order 11,” dated January 14, 2022 (Hofrichter Aff. Ex F [EDOC 254]). In Change Order 11, defendants demanded an additional \$117,200 for the period September 2021 through December 2021, plus, going forward, an additional \$29,300 per month. Around the same time, on January 22, 2022, defendants sent an email threatening to abandon the project if they did not receive the additional

funds set forth in Change Order 11 (see EDOC 148). In that email, defendant Leka attempted to justify the additional monetary demand stating that the project had been a “nightmare” and that defendants had “underbid by \$300,000.00.” Defendants also threatened: “I really hope that you have time to think as soon as you can because Leo [defendant Fusha] is not returning until you make a decision by this week” (*id.*)

After defendants presented the proposed Change Order 11, JRA requested backup for defendants’ request for more money pursuant to the revised Change Order 11 (Reimnitz Dep. at pp. 108-110, 122). Mr. Wiley (from JRA, the architect) emailed defendant Suela Leka on January 24, 2022, requesting a detailed accounting of the \$29,300 amount that was requested in Change Order 11 (*see* EDOC 316, Exhibit L to Affirmation of Darrell John, Esq [John Aff.] in opposition to plaintiff’s motion for summary judgment, dated October 31, 2024).

On January 25, 2022, Mr. Wiley responded to Ms. Leka having sent some back up, noting that “[t]his back-up is very helpful. [And that] [w]e may need to have a call to review some of this information and will let you know” (*id.* at p. 2). Mr. Wiley also noted that the team would “do [their] best to review [the back-up provided] and respond as soon as possible . . . this is the kind of detail we’ve been asking for since before the holiday break in December, so it may take a bit of time to respond and resolve” (*id.*). Lastly, Mr. Wiley noted that they would “pass along [the new back-up provided] to Ed and Gwen because they [were] working through the previous copy of Change Order 11 which did not have the additional detail” (*id.*).

Despite Mr. Wiley writing in the email “this is the kind of detail we’ve been asking for,” Reimnitz has testified that this backup was insufficient (Reimnitz Dep. at p. 189 [stating the only backup “was the sort of back up that just said, well, we spent more time than we thought and here's what we want.”])).

When plaintiffs refused to pay the additional money defendants had demanded, defendants abandoned the Project on January 24, 2022 (Exhibit H to Hofrichter Aff. [EDOC 256]). It is undisputed that defendants left the Brownstone open to the elements in the middle of the winter. It is also undisputed that defendants refused to take any steps to protect the Brownstone from these elements. This resulted in leaks throughout the rear façade and the roof that damaged the work that was already installed (Reimnitz Dep at p. 192). There were also roof leaks at the rear of the Brownstone in addition to leaks where windows had been installed, but not sealed, as well as the lower level of the Brownstone (*id.* at p. 193).

Although there were attempts at negotiation, defendants never returned. As defendant Leka admits, the parties never reached an agreement with respect to Change Order 11 or revised Change Order 11 (*see* EDOC 319, Supplemental Affirmation of Suela Leka, dated October 30, 2024, ¶ 8). Accordingly, plaintiffs gave defendants written notice, on February 11, 2022, that they were in breach of the Agreement and that this breach would be considered final unless defendants swiftly resumed work on the Project (EDOC 271, Exhibit B to Cho Aff.). On February 17, 2022, plaintiffs sent a “Notice of Default, (EDOC 272, Exhibit C to Cho Aff.), wherein plaintiffs delineated their concerns regarding the long-outstanding safety and construction violations, and, again, demanded that defendants cure these violations.

There is no dispute that defendants failed to take any action. Accordingly, on March 25, 2022, plaintiffs terminated Star as general contractor for cause under Article 16 of the Agreement, and reserved their legal rights and remedies against Star, Defendants and their insurers (EDOC 273, Exhibit D to Cho Aff.).

It was later discovered that the defendants’ work on the Project was of poor quality, potentially hazardous, and unprofessional in nature. In his deposition, Mr. Reimnitz noted that

most of the issues with Star's work on the project only came to light after they walked off the job (Reimnitz Dep. at pp. 166). Reimnitz also highlighted serious safety issues such as electrical boxes in the walls not being connected properly (*id.* pp. 167-168).

The parties point fingers at each other as to who bears the blame for the delays on the Project. Plaintiffs, point to several issues. First and foremost, plaintiffs point to the stop work orders the Department of Buildings issued against Star due to defendants' violations, especially the one directed against the rear façade work. Plaintiff also claims that the departure from the architectural plans not only delayed the project, but forced the architect, JRA to revise previous drawings that already had DOB approval (Reimnitz Dep. 158-160; 163).

Defendants for their part blame the architect JRA, and others. For example, defendants, point to an email dated January 25, 2021 (*see* Exhibit G to John Aff. [EDOC 311]). In that email, Seth Wiley, for JRA, states that, for the rear façade redesign, he was "waiting on SBDS's final redesign documents." SBDS was the design firm that Sarah Blank headed. It is undisputed that Sarah Blank did not submit these redesign documents from November 2020 until April 2021 (*see* John Aff. Ex F [EDOC 310] [in which Sarah Blank admits to Suela Leka that "This process is not working well as you are not getting the interior design info that you need in a timely fashion"]]). Defendants point to this document to blame Sarah Blank, the designer, for the delay to the rear scaffolding.

There is also evidence in the record that the plumbing delays may not have been defendants' fault. Defendants did not employ plaintiffs plumbing engineer. Rather plaintiffs employed Jack Green Associates (JGA) directly. In an email dated July 2, 2021, Adam Pollock, an employee of the architect, admitted that it was JGA who had to file a "PAA" first before defendants could schedule a plumbing inspection (*see* John Aff. Ex H [EDOC 312]). One month

later, that same PAA remained open (*id.* Ex I [EDOC 313]). The issue of the open PAA was still not resolved by September 14, 2021 (*see id.* Ex K [EDOC 315]). Indeed, the PAA was still outstanding on November 23, 2021 (Reinmetz Tr. 82-86).

In response, plaintiffs contend that Star contributed so much to the delays, that any delays related to the plumber or Sarah Blank's design changes, did not affect the overall delays that defendants caused. In other words, Blank's redesign and the plumbing issues occurred within the overall delay that defendants caused.

ANALYSIS

Plaintiffs contend that defendants repudiated the contract as a matter of law.

"Courts apply a stringent standard in determining whether the test for repudiation is met, and have generally required repeated insistence on extracontractual terms; repeated, definite and absolute expressions of an unwillingness to perform; use of language such as 'termination,' which conveys finality; or conduct by the allegedly repudiating party that has rendered performance impractical or impossible"

(*In re Best Payphones, Inc.*, 432 B.R. 46, 56 [Bkcy SDNY 2010]).

"A demand for more than the contract calls for is not in itself a repudiation. Only when it amounts to a clear and unequivocal statement of intention not to perform except on conditions that go beyond the contract is it a repudiation" (*O'Shanter Res., Inc. v. Niagara Mohawk Power Corp.*, 915 F Supp 560, 568 [WDNY 1996]). The effect of an anticipatory breach or repudiation is to relieve the other side of its contractual obligations (*see Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp.* 301 AD2d 70 [1st Dep't 2002] [developer's repudiation of contract immediately discharged all of franchisor's remaining obligations]).

In *Pitcher v. Benderson-Wainberg Assocs. II, Ltd. P'ship*, 277 AD2d 586, 588 (3d Dep't 2000) the court found that plaintiffs had repudiated their lease when they advertised their restaurant equipment and supplies for sale both in the local newspaper and on signs posted in the

shop windows. In addition, they had closed their business and removed or sold considerable equipment, including the soda equipment, the menu sign, tables, chairs and the cash register, as well as all perishable food. The phone had also been disconnected. Under these circumstances, although defendants had changed the locks, the court held plaintiffs' wrongful eviction cause of action should have been dismissed and defendant's cross motion granted, on the grounds of anticipatory repudiation.

Similarly, here, it is undisputed that, around January 14, 2022, defendants sent Change Order 11 to plaintiffs. By this point, plaintiffs had already paid defendants \$1,615,000. In that Change Order, defendants asked for an additional \$117,200.00 in a lump sum as well as an additional \$29,300 per month until completion. This request was above and beyond to the amount specified in the contract and prior change orders 1-10. On January 22, 2022, in an email (*see* EDOC 148), defendants threatened to abandon the project if plaintiffs did not pay. When plaintiffs refused, defendants followed through and abandoned the project in the middle of winter. This left the project open to the elements. Defendants never came back, despite a demand from plaintiffs. Thus, plaintiffs have established, *prima facie*, that defendants repudiated the contract.

Defendants make two primary arguments in opposition. First, they argue they were entitled to more money under article 10 of the contract, and therefore it is not they who breached. Then, they argue that they were justified in taking the course of action in issuing Change Order 11 and walking off the project because of delays attributable to others, including plaintiffs and the architect and designer, and that Articles 11 and 16 of the contract entitled them to do so.

A. Article 10

Plaintiffs' position is that the defendants cannot ask for additional monies when the scope of work has not changed. They argue that defendants underbid the project and that is defendants' problem. Defendants contend that Article 10 of the contract allows them to seek additional money "for actual costs, and reasonable overhead and profit" (see Def. Br. in Opposition [EDOC 291] at pg 9). Defendants' interpretation of Article 10 is not correct.

Article 10 (Changes in the work) states:

“§ 10.1 **The Owner**, without invalidating the Contract, may order changes in the Work within the general scope of the Contract, consisting of additions, deletions or other revisions, and the Contract Sum and Contract Time shall be adjusted accordingly, in writing. If the Owner and Contractor cannot agree to a change in the Contract Sum, the Owner shall pay the Contractor its actual cost plus reasonable overhead and profit.

§ 10.2 **The Architect** may authorize or order minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. Such authorization or order shall be in writing and shall be binding on the Owner and Contractor. The Contractor shall proceed with such minor changes promptly.

§ 10.3 **If concealed or unknown physical conditions are encountered** at the site that differ materially from those indicated in the Contract Documents or from those conditions ordinarily found to exist, the Contract Sum and Contract Time shall be subject to equitable adjustment”

(EDOC 252 [emphasis added]).

According to its plain terms, under § 10.1, only the Owner, (i.e. plaintiffs), could change the scope of work. At that point the contractor would be entitled to its "actual cost plus reasonable overhead and profit." Defendants as the contractors simply did not have the right under Article 10 to issue Change Order 11 to obtain a higher amount for actual costs, reasonable overhead or profit.

Defendants had rights under § 10.3 if they encountered concealed or unknown physical conditions that differ materially from those indicated in the Contract Documents. However, defendants do not argue that this situation occurred.

B. Articles 11 and 16, and liability for delays

Defendants then contend that Change Order 11 and Revised Change Order 11 were justified because of delays that were not the defendants' fault. Specifically, defendants argue they were "facing an untenable Contract situation due to increased Project costs, and that the most significant cause of the increased costs were delays attributable to (i) the Plaintiffs, (ii) Plaintiffs' agent, John M. Reimnitz Architect, P.C. ("JRA"), and (iii) Plaintiffs' agent Sarah Blank Design Studios ("SBDS")" (EDOC 304 pg. 5). Defendants further argue that, therefore, the Contract was never repudiated, as they only requested additional monies to cover the increased costs, due to the delays of others.

Section 16.1 of the contract does state that "if the work is stopped under Section 12.3 for a period of 14 days **through no fault of the Contractor**, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the contract."

In addition, § 11.2 of the contract states that that if the "Contractor is delayed at any time in the progress of the Work by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or **other causes beyond the Contractor's control**, the **Contract Time** shall be subject to equitable adjustment." Section 11.3 states that "Costs caused by delays or by improperly timed activities or defective construction shall be borne by the responsible party."

Defendants do not have much luck under section 16.1. To qualify under that section, the work stoppage must in no way be the fault of the contractor. Here, plaintiffs have established that the main source of the delays on this project was defendants.

Section 11.2 likewise does not assist defendants. This is because delays from “other causes beyond the Contractor’s control” do not result in additional funds to the contractor. Rather, all defendants would receive under this circumstance is more time to complete.

Section 11.3 is more applicable to the situation at hand. That section puts the cost for delays squarely on the “responsible party.” Defendants seem to be arguing they were justified in asking for more money for “costs,” because the delays were the fault of others, such as the architect. Defendants impute § 11.3 to plaintiffs by arguing that the architect was plaintiffs’ agent (*see* September 4, 2024 transcript [EDOC 32] at pg 27). Defendants are correct on this point. This is plaintiffs’ motion. Therefore, plaintiff has the burden to eliminate all issues of fact to win on summary judgment. Plaintiffs have not eliminated that the architect, and perhaps designer Sarah Blank, were NOT their agents such that § 11.3 would not apply to plaintiffs.

If § 11.3 applies to plaintiffs, then defendants may have been justified in asking for more money under the contract and therefore cannot be said to have repudiated. Moreover, although the delay that defendants caused concerning the rear façade may have lasted the longest, it is difficult to determine, as a matter of law, whether and to what extent the delays on the part of the architect and others contributed to the overall delay. Therefore, the court denies summary judgment as to liability.

C. Piercing the corporate veil

However, the court does decide as a matter of law that Star's corporate veil can be pierced should plaintiffs succeed at trial. Utilizing defendants' bank records, plaintiffs have established, *prima facie*, that the individual defendants left Star undercapitalized and unable to pay its debts. The bank records also reflect use of corporate funds to pay personal expenses such as the orthodontist. Plaintiffs have also established the requisite domination and control because the record reflects that the individual defendants, Fusha and Leka, directed Star's activities. Nor did the individual defendants maintain corporate formalities. This is evidenced by the complete lack of corporate documents produced in this case.

In opposition, defendants merely state they are not undercapitalized because they have a "robust" insurance policy. However, there is no evidence of any insurance policy in the record. Accordingly, although liability has not yet attached, at trial plaintiffs are relieved from proving veil piercing having already proven this fact. Defendants having failed to defend on this point, have waived any defense to alter ego.

CONCLUSION

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED THAT plaintiffs' motion for summary judgment is granted in part, only to the extent that plaintiff is relieved from proving alter ego on the part of the individual defendants at trial, as set forth in this decision; and it is further

ORDERED that plaintiffs' motion for summary judgment is otherwise denied in all respects; and it is

ORDERED THAT the parties shall attend a pre-trial conference over Microsoft teams on
May 15, 2025 at 11:00 am.

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4/8/2025
DATE


MELISSA A. CRANE, 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 type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE