

Gibraltar Contr., Inc. v Atria Bldrs., LLC

2011 NY Slip Op 33885(U)

April 21, 2011

Supreme Court, New York County

Docket Number: 650147/09E

Judge: Paul G. Feinman

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

PRESENT: PAUL G. FEINMAN
Justice

PART 12

Gibraltar Contracting, Inc.

INDEX NO. 650147/09 E

MOTION DATE 1/19/2011

- v -
Atria Builders, LLC 328-330
East 109 LLC, 333-339 East 109 LLC
and 119-Third LLC

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for

Oral Argument 1/19/2011 ct Reporter Lisa Casey

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits

Supplemental Affirmation in Opp.

Sur-Reply

Cross-Motion: Yes No

E-Filed Documents

PAPERS NUMBERED

15, 16, 17, 17-1 through 17-5

18, 18-1, 19, 19-1 through 19-3

20

22

23, 23-1

Interim Order 21

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

Dated: April 21, 2011

Paul G. Feinman
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM: IAS PART 12

-----X

GIBRALTAR CONTRACTING, INC.,
Plaintiff,

-against-

ATRIA BUILDERS, LLC, 328-330 EAST 109 LLC,
333-339 EAST 109 LLC and 119-THIRD LLC,
Defendants.

Index No. 650147/2009
Mot. Seq. No. 002
DECISION & ORDER

-----X

Appearances: Plaintiff

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Defendants

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Papers considered on review of this motion for summary judgment:

Papers¹	E-Filing Document No.
Notice of Motion, Affs., Exhibits	15, 16, 17, 17-1 through 17-5
Affs. in Opposition, Exhibits	18, 18-1, 19, 19-1 through 19-3
Aff. in Reply	20
Aff. in Further Opposition, Exhibits	22
Sur-reply Aff. in Support, Exhibits	23
Transcript of Oral Argument	24

PAUL G. FEINMAN, J.:

Plaintiff Gibraltar Contracting, Inc. moves, pursuant to CPLR 3212, for an order granting it partial summary judgment and dismissing defendant 119-Third LLC from this action, and dismissing the third, fourth, fifth, and sixth causes of action, and granting summary judgment in Gibraltar's favor on the first and second causes of action for breach of contract asserted against defendant Atria Builders, LLC.

¹By interim order dated December 8, 2010, this court granted defendants permission to file supplemental papers to submit newly discovered information, including an architect's report, in opposition to the motion by December 31, 2010, and granted Gibraltar permission to file supplemental papers in support of the motion by January 14, 2011, prior to oral argument and submission of the motion.

Factual Background

In this action, Gibraltar, a subcontractor, seeks to recover payment for work and services rendered, and materials provided, to Atria, a general contractor, at premises located at 328-330 East 109th Street (the 328 premises) and 333-339 East 109th Street (the 333 premises) in Manhattan, in connection with the construction of condominium buildings at these locations. At the time that the work was performed, the properties were owned by defendants 328-330 East 109 LLC (the 328 LLC) and 333-339 East 109 LLC (the 333 LLC).

By letter agreement dated October 12, 2007 and purchase order with general conditions dated November 2, 2007, Atria retained Gibraltar to install precast stone panels supplied by Atria between the windows on the front and sides of the 328 premises, to install waterproofing, and to erect, maintain, and remove a pipe scaffolding system at the 328 premises. The total contract price was \$82,500, including sales tax.

There is no dispute that Atria ordered the stone panels, and that the panels delivered did not fit properly on the building facade. Therefore, by letter agreement executed March 6, 2008, Atria retained Gibraltar to provide the labor necessary to caulk the front facade stone panels and windows, in exchange for \$3,600, plus sales tax, or, \$3,901.50.

There is also no dispute that Atria issued five change orders as the 328 premises project continued, in amounts totaling \$27,125.

By application and certification for payment and invoices dated January 28, March 6, and April 8, 2008, each issued after completion of the work billed, Gibraltar demanded payment from Atria in the amounts of \$57,466.75 on the initial purchase order, \$3,901.50 on the caulking agreement, and \$27,125 on the five change orders to the purchase order. Pursuant to the

purchase order terms, payment was due 30 days after the date of each invoice.

Atria paid Gibraltar \$20,000 against the January 28 invoice, and, allegedly without explanation to Gibraltar, failed to pay the outstanding balance of \$68,495.25 for work performed and materials supplied at the 328 premises.

Meanwhile, by letter agreement dated March 3, 2008, Atria retained Gibraltar to form and install rebar and pour concrete stairs at the 333 premises. The contract price was \$24,000, plus sales tax. By invoice dated April 3, 2008, issued after completion of the work, Gibraltar billed Atria for \$26,010, the total amount due under the agreement. Gibraltar alleges that, although payment was due 30 days after the date of the invoice, Atria has paid nothing against this invoice.

Gibraltar alleges that it fully performed all its contractual and professional obligations at both the 328 and 333 premises.

In addition, Gibraltar alleges that Atria retained the applications for payment and invoices without comment, and never provided Gibraltar with a written statement regarding its withholding of payment for any of the items of work.

On these allegations, Gibraltar commenced the instant action against Atria, 328 LLC, 333 LLC, and 119-Third LLC. In the first cause of action, Gibraltar seeks to recover from Atria the sum of \$68,495.25, together with interest, for work performed and materials supplied at the 328 premises. In the second cause of action, Gibraltar seeks to recover from Atria \$26,010, together with interest, for work performed and materials supplied at the 333 premises.

In the answer, Atria, the 328 LLC, and the 333 LLC deny all allegations of breach of contract. They do not assert any affirmative defenses or counterclaims.

Gibraltar now seeks summary judgment on the breach of contract claims asserted against

Atria, contending that the documentary evidence conclusively establishes that it fully performed its contractual obligations at both premises, that it duly submitted applications for payment and invoices to Atria, that Atria did not object to these payment demands, and that Atria has failed to pay in full, in violation of the Prompt Payment Act (*see* General Business Law [GBL] § 756-a).

In opposition, Atria contends that numerous triable issues exist, including whether Gibraltar billed for work that it did not perform in a workmanlike manner, or did not perform at all, and that Gibraltar's failure to properly perform its contractual duties required Atria to continually supervise Gibraltar's work, resulting in a delay of the project's completion, and in an increase of the total project cost. Atria also contends that it timely objected to Gibraltar's demands for payment, and reduced and withheld payment, in accordance with the purchase order terms and the Prompt Payment Act.

Analysis

In relevant part, the Prompt Payment Act requires a general contractor to pay its subcontractors "strictly in accordance with the terms of the construction contract" (GBL § 756-a [3] [b] [i]). With respect to payment for the 328 premises work, the November 2, 2008 purchase order provides, "Payment Terms: Invoice 25th of The Month, Net 30 Days." The Act further provides that "[p]erformance by a subcontractor in accordance with the provisions of its contract shall entitle it to payment from the party with which it contracts" (GBL § 756-a [3] [b] [i]). Therefore, Gibraltar was required to issue invoices on the 25th day of the relevant month, and Atria was required to pay each invoice within 30 days after that date, provided that Gibraltar had fully performed its contractual obligations.

Atria had the right to object to Gibraltar's demands for payment. The Prompt Payment

Act permits such objection, upon proper written notification (*see id.*, § 756-a [2] [a] [i], [3] [b] [iv] [1]). The Act provides that, "[u]pon delivery of an invoice and all contractually required documentation, a contractor or subcontractor shall approve or disapprove all or a portion of such invoice within twelve business days" (*id.*, § 756-a [2] [a] [ii]). The Act further provides that "[c]ontractor and subcontractor approval of invoices shall not be unreasonably withheld nor shall a contractor or subcontractor, in bad faith, disapprove all or a portion of an invoice" (*id.*). A contractor or subcontractor may disapprove an invoice on the basis of "(1) Unsatisfactory or disputed job progress; (2) Defective construction work or material not remedied; (3) Disputed work; (4) Failure to comply with other material provisions of the construction contract; or the (5) Failure of the subcontractor to make timely payments for labor" (*id.*).

Similarly, the purchase order provides that, "[i]f the Contractor and Design Team deem it inexpedient to correct Work damaged or Work not performed in accordance with the Contract Documents, an equitable deduction from the Purchase Order Price shall be made" (Atria/Gibraltar Purchase Order, General Conditions, Art. 13 [A]).

With respect to the first cause of action to recover payment for work performed and materials supplied at the 328 premises, Gibraltar contends that the undisputed record conclusively demonstrates that it fully performed its contractual obligations imposed by the initial purchase order, the five change orders, and the caulking agreement to Atria's satisfaction, and that Atria has failed to pay invoiced amounts totaling \$68,495.25.

In opposition, Atria contends that triable issues exist regarding whether Gibraltar performed its work properly, and contends that it timely objected to Gibraltar's invoices, in accordance with contract and statute.

[* 7]

Summary judgment is granted in favor of Gibraltar. While summary judgment is a drastic remedy, it is warranted where the movant demonstrates that no genuine triable issues of material fact exist (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see CPLR 3212). Initially, "the proponent of a summary judgment motion 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or the motion will be granted (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Gibraltar has demonstrated its entitlement to payment. There is no dispute that, in October 2007, Atria hired Gibraltar to install precast stone panels supplied by Atria on the front and sides of the 328 premises, to install waterproofing, and to erect, maintain, and remove a pipe scaffolding system at the 328 premises (see Atria by Elie Deitsch, Mar. 23, 2010 Dep Tr, at 6:10-22; Atria/Gibraltar Oct. 12, 2007 Letter Agr.; Atria/Gibraltar Purchase Order). Elie Deitsch, the Atria project manager, admitted at deposition on behalf of Atria that Gibraltar installed the panels, and fully completed its work at the 328 premises (see Atria by Deitsch Dep Tr, at 7:10-12, 9:13-18; 27:20-23). Atria also admits that it found the quality of Gibraltar's work to be satisfactory, and performed in accordance with the Building Code (see *id.* at 10:10-13, 12:9-12; Deitsch Oct. 8, 2010 Aff., ¶ 12). Atria admits that no part of Gibraltar's completed work was required to be redone, and that it did not hire anyone to complete Gibraltar's work, after Gibraltar left the job site (see Atria by Deitsch Dep Tr, at 18:12-15, 27:16-19).

Atria has failed to raise any genuine triable issues in opposition. Atria has failed to offer

any objective proof to substantiate its allegations of unnecessary labor costs, and extended project delays, incurred as the result of Gibraltar's performance. Moreover, Atria admits that it has not even performed any computations with respect to these alleged increased costs (*see id.*, at 17:2-6).

The record demonstrates that Atria incurred no additional expenses as a result of its alleged need to closely supervise Gibraltar's work. The supervision was performed by two Atria employees whose job descriptions required them to supervise the subcontractors on the 328 premises project – Shlomo Silber, an Atria supervisor, and Juan Plaza, an Atria work foreman (*see id.* at 10:3 to 12:8). Atria admits that neither Silber nor Plaza received any additional compensation as the result of their supervision of Gibraltar's work, and that no additional employees were hired by Atria to perform the jobs regularly performed by Silber and Plaza (*see id.* at 16:6-21).

Atria also admits that it did not incur any costs in supplying Gibraltar with the materials necessary to install the panels, and that Gibraltar supplied all of those materials, including the replacement shims, brackets, and screws required by the project specifications, at its own cost (*see id.* at 12:13 to 13:15).

The architect's report upon which Atria relies fails to raise any triable issues regarding Gibraltar's performance of its contractual duties and entitlement to payment. The report, issued November 3, 2010, was prepared by Howard L. Zimmerman, Architects, P.C. (Zimmerman PC), at the request of nonparty Board of Managers of Aura Condominium, the current owner of the 328 premises (the Board). The Board hired Zimmerman PC to inspect the 328 premises, to identify defects in the quality of its construction, and to evaluate the general condition of its

interior and exterior (*see* Zimmerman PC Report, § I). Significantly, the report is not an expert witness report, was not prepared in connection with the action at bar, and does not directly reference the claims raised in this action.

The report was prepared more than two years after Gibraltar left the work site, and does not mention Gibraltar by name, nor does it identify any of the other 10 to 15 subcontractors present during the construction of the 328 premises. While, in the report, Zimmerman PC identifies some problems with the precast panels, such as an inconsistency in the finish of the installed panels and rust staining, it does not identify a reason for these problems, noting that "[i]t was unclear at the time of the inspection whether this was due to some form of sealing, patching or other event" (*see id.*, § VI [B] [2] [c]). With regard to its finding of water intrusion behind the panels, Zimmerman PC notes that these panels are not generally intended to inhibit all water intrusion, and recommends that the approved shop drawings for the 328 premises "be reviewed by a licensed Professional Engineer and a Registered Architect to determine the nature of the support and waterproofing mechanisms" (*id.*). Zimmerman PC also notes that "[t]he condition of the Building will change over time and the rate of change will vary with the type of construction, history of maintenance and repair as well as environmental conditions" (*see id.*, § IV). Therefore, from Zimmerman PC's findings, it does not appear that Gibraltar's work could have been the cause of the reported defects in the precast panels and exterior waterproofing.

Atria's contentions that Atria properly reduced and objected to Gibraltar's demands for payment under the initial purchase order, the five change orders, and the separate agreement to caulk the precast panels are not substantiated by the record. The Prompt Payment Act provides that, "[i]f an owner declines to approve an invoice or a portion thereof, it must prepare and issue

a written statement describing those items in the invoice that are not approved" (GBL § 756-a [2] [a] [i]). The Act also provides that "the contractor shall: . . . prior to the due date for a subcontractor or material supplier payment, furnish to the subcontractor or material supplier and the owner written notice of withholding specifying conditions for withholding payment and identifying the amount to be withheld" (GBL § 756-a [3] [b] [iv] [1]).

The record is devoid of any evidence that Atria objected in writing to any of Gibraltar's demands for payment. Although the January 28, 2008 invoice and the breakdown change order bear handwritten notes by Deitsch apparently relating to Gibraltar's work performed and not yet performed, and to reductions and withholdings of payment, there is no evidence that these notes were ever shown to Gibraltar. The fifth change order, in the amount of \$3,000, was admittedly approved by Deitsch for payment (*see* Atria by Deitsch Dep Tr, at 28:22 to 29:12), yet no payment was made by Atria.

In any event, even had these notes been forwarded to Gibraltar, as discussed above, Atria admits that Gibraltar corrected any defects in its work, and fully performed its contractual duties. Therefore, in accordance with the contracts and the Prompt Payment Act, Atria was required to pay Gibraltar in full.

For this reason as well, Atria's reliance on the general conditions incorporated into the purchase order is unavailing. The purchase order provides that, "[i]f the Contractor and Design Team deem it inexpedient to correct Work damaged or Work not performed in accordance with the Contract Documents, an equitable deduction from the Purchase Order Price shall be made" (Atria/Gibraltar Purchase Order, General Conditions, Art. 13 [A]). Atria admits that Gibraltar's work was corrected and performed in accordance with the contract documents and Building

Code, albeit allegedly with Atria's close supervision.

With regard to the waterproofing work listed in the scope of work section of the initial purchase order, Atria admits that, while Gibraltar initially agreed to perform the waterproofing, that agreement later changed, and Atria itself provided the waterproofing services (*see* Atria by Deutsch Dep Tr, at 14:11 to 15:14). Atria also admits that there was never any communication between Atria and Gibraltar regarding the waterproofing (*see id.*, at 15:11-14). There is no evidence in the record indicating that Gibraltar actually performed the waterproofing, billed for that work, or is seeking payment for such work in this action.

For these reasons, that branch of the motion for summary judgment as to liability and damages on the first cause of action in favor of Gibraltar and against Atria is granted as to the purchase order, the change orders, and the caulking agreement

Next, Gibraltar moves for summary judgment on the second cause of action to recover payment for work performed and materials supplied at the 333 premises.

In opposition, Atria contends that genuine triable issues of material fact exist regarding whether Gibraltar properly performed its contractual obligations relating to the 333 premises project, and whether Atria properly rejected or reduced the invoices relating to that project.

The undisputed documentary record conclusively demonstrates the existence of a written contract dated March 3, 2008 requiring Atria to pay Gibraltar \$24,000, plus sales tax, in exchange for Gibraltar's work in installing rebar and pouring concrete stairs at the 333 premises project. The record also demonstrates that, by invoice dated April 3, 2008, Gibraltar billed Atria for the contractual amount, or, \$26,010, and that Atria has failed to pay any portion of the amount billed.

The record demonstrates that Atria's project manager, Deitsch, was familiar with the terms of the agreement, and, on April 6, 2008, accepted and approved it on behalf of Atria by a notation at the bottom of the letter agreement (*see id.* at 31:10-25 to 32:2-10). Significantly, Deitsch testified that Gibraltar performed the work, and that he did not recall finding any problem with Gibraltar's work (*see id.* at 32:11-15). In addition, Deitsch attests that, "[i]n reviewing the work performed, and after discussing the matter with certain parties familiar with Gibraltar's work at [the 333 premises], I can confirm that the stairs were properly installed" (Deitsch Aff., ¶ 36).

While Deitsch also attests that "substantial resources" and "unnecessary supervision" were expended by Atria "to ensure that Gibraltar properly installed the stairs in accordance with the building plans" (*id.*, ¶ 37), these allegations are vague and wholly unsubstantiated. The record is devoid of any evidence that Atria actually incurred any additional costs or delays at the 333 premises project as the result of Gibraltar's work performance, or that Atria timely rejected, or objected to, the invoice. Therefore, Atria has failed to raise any triable issues with respect to the second cause of action.

For these reasons, that branch of the motion for summary judgment on the second cause of action as to liability and damages is granted in favor of Gibraltar and against Atria.

Summary judgment in favor of Gibraltar is also granted on the branch of the motion for interest due through August 2010, the date this motion was filed, at the rate of 1% per month, in accordance with the Prompt Payment Act. The remedy for a failure to make a payment in compliance with the provisions of the Prompt Payment Act is the accrual of interest on the amounts due, beginning on the day following the due date of the amount due, at the rate of 1%

per month, or a fraction of a month on the unpaid balance (*see* GBL § 756-b [1] [b]). As held above, Atria failed to pay Gibraltar in accordance with the Act.

Atria does not contest Gibraltar's interest calculations. Therefore, summary judgment is granted in favor of Gibraltar and against Atria in the amount of \$87,737.99 on the first cause of action, and \$33,032.70 on the second cause of action.

That branch of the motion which seeks permission to voluntarily dismiss 119-Third LLC from this action is granted without opposition. Gibraltar concedes that it never served this defendant with a copy of the summons and complaint.

Last, that branch of the motion for summary judgment on, and dismissal of, the fourth, fifth, and sixth causes of action is granted without opposition. In these claims, Gibraltar seeks orders directing defendants to comply with its requests for verified statements from the trustee pursuant to Lien Law § 76. The relief requested was granted by court order dated June 5, 2009, and Gibraltar admits that defendants have fully complied with the order.

Accordingly, it is

ORDERED that the motion for summary judgment is granted as follows: (1) on the first cause of action and the Clerk of the Court is directed to enter judgment in favor of plaintiff Gibraltar Contracting, Inc. and against defendant Atria Builders, LLC in the amount of \$87,737.99; (2) on the second cause of action and the Clerk is directed to enter judgment in favor of plaintiff Gibraltar Contracting, Inc. and against defendant Atria Builders, LLC in the amount of \$33,032.70; and (3) interest is awarded on the first and second causes of action at the rate of 1% per month from August 2010, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements

to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of Court shall enter judgment dismissing the complaint in its entirety as asserted against defendant 119-Third LLC; and it is further

ORDERED that the Clerk of Court shall enter judgment dismissing the fourth, fifth, and sixth causes of action.

This constitutes the decision and order of the court.

Dated: April 21, 2011



J.S.C.