Window Broker, Inc. v Barner
2017 NY Slip Op 31700(U)
August 15, 2017
Supreme Court, Tioga County
Docket Number: 42784
Judge: Eugene D. Faughnan

At a Trial Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Ithaca, New York, on April 10th thru April 12th, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

WINDOW BROKER, INC.

Plaintiff,

-vs-

LOUIS E. BARNER and
DEBORAH J. BARNER

Defendants.

DECISION AFTER TRIAL

Index No. 42784
RJI No. 2016-0179-C

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This is an action for breach of contract, unjust enrichment and quantum meruit. Following a non-jury trial from April 10, 2017 thru April 12, 2017, both sides submitted Post-trial briefs, which have been reviewed and considered. After due deliberation, this constitutes the Court's Decision and Order in this matter.

BACKGROUND FACTS

Window Broker, Inc. ("Plaintiff" or "Window Broker") entered into a contract with Louis E. Barner and Deborah J. Barner ("Defendants") on August 29, 2011 to install 20 replacement windows in Defendants' home, including 7 windows in a single story addition. The contract provided for a total cost of $17,152.00 with a down payment of $7,152.00 and the balance of $10,000.00 due upon completion. The work was performed in November, 2011. Defendants were not satisfied with the work and notified Plaintiff, who returned to perform punchlist items. Following that, Defendants were still not satisfied and withheld payment of the remaining balance.

PROCEDURAL HISTORY

Plaintiff filed a mechanic's lien related to the work in March, 2012, and commenced the instant action on April 24, 2012. Defendants served an Answer with Affirmative Defenses on January 4, 2013. More than 4 years later, the case proceeded to a non-jury trial.

During the discovery phase, various orders were made. The Court issued a scheduling Order dated July 21, 2016 directing deadlines for expert disclosure, and setting the case for trial in December, 2016. Plaintiff identified Bret Hadlick and Ed Guido as experts, as well as David Jones and Colleen Jones. Defendants identified Steven McElwain as an engineering expert.

Shortly before the scheduled trial date, Plaintiff made a motion to preclude certain evidence pertaining to Defendants' counterclaims, and Defendants filed their own motion to allow certain expert testimony on their behalf, and to preclude certain expert testimony from Plaintiff's expert. Following arguments, the Court re-scheduled the start of the trial, and granted Plaintiff additional discovery. The Court further concluded that Defendants failed to file a timely Expert response for a contractor expert, and found that Defendants had performed an invasive investigation of the wall and window installation without Plaintiff, or its representatives, being present for that inspection. Therefore, Plaintiff was allowed to conduct their own inspection and modify it's expert opinions based upon their own inspection. Defendants were denied the opportunity to modify their own expert opinions. Plaintiff subsequently obtained an additional expert report, and then identified Ronald Lake as its engineering expert.

DISCUSSION

David Jones testified he met with the Defendants prior to the start of the project to discuss the scope of the work, the time-frame and cost. Following that meeting, a contract was signed with respect to the project. The parties disagree on what was specifically part of the contract. Plaintiff's complaint alleges that both parties agreed to a proposed layout of the windows, which was attached as Exhibit "B" to the Plaintiff's complaint. Defendants contend that there was a second proposed layout of the windows, that ultimately became the agreed upon design, and they attached it to their Answer. According to Defendants, the difference in the two sketches is important, and material, to the contract, and highlighted the importance of the continuity of the lines of glass and line of sight.

Defendants contend that Plaintiff did not even install the correct window design, pointing to a difference in the sketch drawn during the initial discussions about the scope of the project, and a later email with the proposed contract, and a different design. However, under the parol evidence rule, consideration of any such extrinsic evidence would be appropriate only if there was an ambiguity in the contract. The contract at issue is a two page document that sets forth all

the necessary specifications for this project. The contract is clear and complete on its face. Therefore, consideration of extrinsic evidence, in the form of sketches or negotiations is unwarranted, and inappropriate.

Jones testified that the windows installed by Plaintiff were manufactured by Gorell, and were custom made windows. After the installation of the windows, Defendants had raised concerns, so Jones and a representative of Gorell went to the site to investigate the issues. Various items were reviewed and inspected. Paint overspray was observed on the glass, and that would have been a manufacturing error. A trim piece was also observed to be too short, and that was also a manufacturing flaw. Two of the slider sash pieces also had weather stripping showing, which would need to be fixed. There was also a nick in one of the channel pieces that would require all four sides to be replaced. Window screens on the front sliding window did not fit property, and the Gorell representative indicated that would be replaced by Gorell. There were also defects noted on the vinyl wrap of the windows, in that some of the joints did not close, and the caulking was not done properly.

Plaintiff replied by email to the issues raised by Defendants following that inspection. Plaintiff acknowledged warranty issues that would be addressed after Defendants made payment. Those warranty issues included replacing a window sash, and damaged siding, as well as the overspray, screens, vinyl trim and paint chips. However, there is no evidence that Defendants paid the balance due on the contract, nor made a written warranty claim to Gorell.

There was considerable testimony presented with respect to the vertical posts between the windows and whether those were load bearing beams. An employee for Plaintiff, Edward Guido, testified that he had determined that the posts were not load bearing, and he left them in place with steel plates attached to the header. Defendants contend that there was a four foot span of the header between each post, and therefore, the removal of the support posts weakened the structure. Defendants' experts testified that the removal of the posts left a twelve foot header that was not properly supported, and was contrary to New York State Building codes.

Plaintiff's experts testified that the use of steel plates on the inside and outside of the header and posts increased the strength of the header, and that Defendants' experts used the wrong calculation in determining the carrying capacity. Further, Plaintiff's experts testified that

there was no evidence of any header failure, sagging or deflection. In fact, even after more than five years since the work, the fixed and slider windows were still plumb and level, and operating properly.

The Court finds the Plaintiff's experts to be more persuasive and credible in this regard. In this particular case, due to the length of time that elapsed between the work, and the trial, the parties, and the Court, had the benefit of being able to see how the work has held up, and make evaluations based on that. Here, the evidence shows that there has been no compromise of the structure, or the performance of the windows. Based on the testimony of those who performed the work, the pictures presented, and the testimony of the experts, the Court finds that the conclusions of the Plaintiff's experts are more credible. There is no evidence that the structure has been adversely impacted, or that the windows are no longer level, or not functioning properly. Although there were two cracks that developed over the windows, the Court does not find them to be out of the realm of normal wear and tear or settling conditions. The Court credits the testimony of Mr. Lake that if there were any structural problems with the header, such evidence would have been manifested by now such as evidence of more significant drywall cracks or pops of the fasteners attaching the drywall to the header. The Court cannot agree with Defendants that the windows must be removed and replaced with different windows.

While the Court finds that there are no structural defects, and the Plaintiff performed under the contract, the Court does find that in many instances, the workmanship was less than acceptable. The photographs and testimony provide ample evidence that there were many areas where the trim did not fit properly and left gaps. The parties disagree as to whether it was the responsibility of the Plaintiff or Defendants to stain or seal the wood trim. Plaintiff contends that it was Defendants responsibility, and it cannot be determined which defects in the trim were due to installation, and which were due to the failure to seal the wood trim. However, Plaintiff's own expert also agreed there was not a substantial change in the woodwork from the time the installation was finished up until 2016. Moreover, Plaintiff would have either had seal the trim properly, or provide it to Defendants to do in advance of the installation. Defendants offered

evidence that the cost to replace the trim is $2,170.[1] That estimate was based on using oak trim instead of pine. However, the contract between Plaintiff and Defendants specifically listed pine trim. Defendants were never charged for the upgrade to oak trim. The Defendant are entitled to replacement of all the wood trim, at the agreed upon terms, which called for pine. Plaintiff's expert found the reasonable cost to be around $1,000. The Court finds in favor of Defendants for that amount.

Defendants also claim excessive air filtration and moisture leakage in the room as a result of the installation. The Court finds that Defendants have failed to satisfy their claim in that regard, and provided no proof of damages in any event. Therefore, that claim for damages in denied.

Defendants also made a claim that there was improper caulking done around the windows. Although Plaintiff contends that some of the caulking was pre-existing, the Court finds that Defendants have established Plaintiff's responsibility by a preponderance of the evidence. The testimony established that the cost to caulk all the outside areas would be around $300. The Court finds in favor of Defendants for that amount.

The parties produced conflicting evidence with respect to the exterior coil installation. The Court finds the Plaintiff's testimony, explaining how they cut and bent the coils, to be more credible. Accordingly, Defendants have not established Plaintiff's liability with respect to the exterior coils, but even if they had, the Court would not award damages as there was no proof on that.

As noted previously, there are also claims concerning paint overspray and improper screen sizes. However, those were manufacturing issues, and subject to warranty claims. They are not due to any defective installation, and accordingly, are not recoverable by Defendants in this action.

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[1]Defendants' estimate also specifically provides that the customer will finish/seal the trim prior to installation. While there may be some additional cost for that, insufficient evidence was provided to award any damages.

CONCLUSION

Based upon all the foregoing, the Court finds in favor of the Plaintiff with respect to its claim for damages in the amount of $10,000. From that amount, however, the Court finds in favor of Defendants for its claims of poor workmanship with respect to the wood trim and caulking, in the amounts of $1,000 and $300, respectively. Those amounts are to be deducted from the amount owed to the Plaintiff.

Plaintiff is to submit an Order/Judgment on notice to Defendants within 30 days of the signing of this Decision.

This constitutes the DECISION of the Court.

Dated: August 15, 2017
Owego, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice