

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: November 24, 2014)

ATLANTIC CONTROL SYSTEMS, INC. :
 :
 :
 vs. :
 :
 MARA GENERAL CONTRACTORS, INC., :
 GREENFIELD COMMONS, LLP and :
 MARK PERROTTI :

C.A. No. PC-10-4371

MARA GENERAL CONTRACTORS, INC., :
 GREENFIELD COMMONS, LLP and :
 MARK PERROTTI :
 :
 :
 vs. :
 :
 ATLANTIC CONTROL SYSTEMS, INC. and :
 JAMES GRUNDY :

DECISION

DARIGAN, J. This matter was heard by Associate Justice Francis J. Darigan, Jr. (R.I. Superior Court retired) on October 27 and 28, 2014 as a hearing on binding arbitration agreed to by all parties.

The issues in this case brought by the Plaintiff, Atlantic Control Systems, Inc. (Atlantic), were contained in five counts. Count I, Breach of Contract against Mara General Contractors, Inc. (Mara); Count II, Breach of Contract against Mark Perrotti (Perrotti) personally; Count III, Quantum Meruit against Mara; Count IV, Quantum Meruit against Perrotti; and Count V, Unjust Enrichment against Greenfield Commons, LLP (Greenfield).

The Defendants have counterclaimed for Breach of Contract and Unjust Enrichment against Atlantic for failing to complete the project and for causing the Defendants to lose

financing for the project. There is also a Count for Lost Profits against Atlantic because the job was not completed by Atlantic. Defendants' third-party Complaint is against Mr. James Grundy personally for Fraud, Misrepresentation and Deceit.

The case revolved around Atlantic's Counts I and II against Mara and Perrotti for Breach of Contract and the Defendants' counterclaim against Atlantic for Breach of Contract and Unjust Enrichment and the third-party Defendants' Complaint against James Grundy, personally, for Misrepresentation, Fraud and Deceit, as well as the claim by Mara for Loss of Profit for failing to complete the project.

The parties, Mara and Atlantic, and the persons, Perrotti and Grundy, entered into a contract for \$190,000 (later increased to \$228,000) for site work on a piece of land owned by Greenfield to do the site work, utility work and HVAC work for Mara on a condominium project. There were to be constructed five buildings with two units each. The contract for the site work on the buildings was for \$45,000 (\$9000 per building) for foundation work, etc.

The initial \$190,000 contract dated October 13, 2004 was signed on or about November 24, 2004 by Perrotti. Because of a delay in construction and rising costs, this contract was revised on or about October 2, 2006 to a figure of \$228,000 in addition to the contract for the buildings of \$45,000.

It is agreed that most of the work done on the project was in 2007 and 2008.

In addition to these contracts, there was a provision contained in each for the removal, disposal or handling of ledge or boulders greater than two cubic yards. This work was to be done by Atlantic on a "cost plus" basis and invoiced and paid by Mara to Atlantic as these materials were encountered.

There is no dispute that a great deal of ledge and boulder was encountered on this project.

Mara obtained financing for this project from Sovereign Bank for a construction loan in the amount of \$300,000 and a construction loan mortgage for \$1,000,000.

The work pursuant to the two contracts was not completed and the bank curtailed financing for Mara.

The Court heard from two witnesses, Mr. James Grundy of Atlantic and Mr. Mark Perrotti of Mara. Both testified regarding their respective actions, perceptions and facts concerning their respective roles in the project.

It is not disputed that the contracts, as indicated infra, were entered into by the parties for the amounts stated. It is not in dispute that a company called Pioneer and a company called Patriot were responsible for the blasting of ledge and boulder and the crushing of the same. Each was to be paid directly by Mara for this work and Atlantic was to remove the debris and invoice this work which was outside of the contracts entered into and in accordance with general practice for this type of work in the construction industry.

Mr. Grundy has been associated with Atlantic since 1978 and its principal since 1992. He testified that he routinely invoiced Mara for work done pursuant to the contracts and invoiced separately for work done to remove ledge and boulder from the site. While invoiced separately, all invoices were submitted to Mara from time to time in the same mailing or delivery.

Atlantic tendered some thirty-five invoices to Mara which were introduced in evidence at the hearing. Each was clearly marked and enumerated either as being for rock and ledge removal, outside the contract, or site work done pursuant to the contracts. Each invoice was specific as to what was done, at what cost; and for site work, what percentage of the entire job was to be completed.

Mara denies receiving any invoices regarding the removal of boulder and ledge and, while acknowledging being in receipt of four invoices for site work per the contracts, testified that he did not forward these to the bank and could not articulate a reason why he didn't present them.

Atlantic submitted invoices for contract work done with estimates of completion of the site work, from a beginning of 24% complete to the last invoice indicating 92% complete.

At no time did Mara or Sovereign Bank complain to Atlantic about the quality of the work done or the percentage of completion as recorded on the various invoices by Atlantic.

Mr. Grundy testified he had regular contact with Mara on site several times a week without any complaint from Mara, and he also testified that he never saw an inspector on site on behalf of Sovereign Bank and never received a complaint from the bank.

Mr. Grundy testified that he worked on site without receiving a check, after two payments were made, for approximately eight months while he continued his work on the project. He acknowledged that this happened from time to time in the construction industry as sometimes problems unforeseen developed to delay payment. He also testified that if he knew the project was in trouble, he may have "bought into" the project to finish it and protect his investment. He testified he had done this on other occasions in his business. He also testified that while he was familiar with a bank dispensing funds to contractors, he testified he had no personal knowledge of Mara's financing agreement with Sovereign Bank.

Mr. Grundy testified that his business location suffered a serious fire which destroyed his facility and his records. He testified that he retrieved the numerous invoices submitted during this hearing from a disk containing the information in the possession of his accountant and that

each invoice is correct in all respects. The Court finds no reason to question the authenticity of the invoices despite objections raised by Mara and his counsel.

On cross-examination, Mr. Grundy acknowledged he received \$223,223 from Mara against the two contracts in actual money received, but that when the ledge and boulder removal and other extras are considered, Mr. Grundy averred that Mara still owed Atlantic \$161,000.

When questioned on the percentage of completion of the site work on the various invoices submitted to Mara, Mr. Grundy testified that the numbers presented were projections of the percentage of the work that would have been completed by the time the invoice was submitted to the bank for payment. He testified that this approach is standard in the construction industry to inform the lender how the job was progressing.

Mr. Grundy reiterated he had no idea how Mara was dealing with his lender or, in fact, what was being submitted to the lender.

When questioned on the percentage of the completion of the detention ponds at 100%, Mr. Grundy said 100% of the line item of \$5100 was completed, what remained was raking and seeding indicated on another line in invoice number 9410 of November 19, 2007. This was never completed because the project ended.

There arose an issue as to ejector units ordered for the project. Atlantic purchased ten of these units for installation in the five duplex buildings. Two were installed by Atlantic, two were left on site and six were destroyed in the fire at the Atlantic facility. Atlantic concedes a credit of \$21,000 is due to Mara, etc. against Atlantic's claim it is owed \$161,000, reducing Atlantic's claim to \$140,000. It is in dispute as to whether or not two ejector units were left at the site by Atlantic and not installed. Mara denies that the two units were on the site. Atlantic testified that each ejector unit cost Atlantic \$3500; therefore, six destroyed units results in the \$21,000 credit

to Mara. Mara also disputes the value of the units as testified to by Atlantic, believing the cost to be considerably higher at approximately \$8000 per unit.

Perrotti testified that he was a general contractor and president and owner of Mara. He contracted with Atlantic because of its bid and on the recommendation of a friend of his. He relied on Atlantic to do the site work because he felt he was not allowed to do this by an undesignated Rhode Island statute and because he had no experience in road and sewer construction. He testified it was never his intent to be bound personally to the contracts he entered into with Atlantic; however, there is much confusion on this point as shown in his deposition of March 17, 2011 on pages six, seven, fourteen and fifteen where he appears quite confused as to who the parties to the contracts at issue were, as well as in his testimony at the hearing itself.

The Court found that Perrotti had a great deal of trouble recalling events and figures concerning the project.

Perrotti testified that the first two invoices that he received from Atlantic which he paid were invoice number 8819 for \$55,700 and invoice number 8820 for \$22,505 for a total of \$78,205 which were dated March 27, 2007 and which were paid on May 17, 2007 on check number 1741. He denies receiving any other invoices or, if received, which at one point he did recall, did not send to Sovereign Bank.

Atlantic was paid \$223,225.50 in four separate checks, two in 2007 and two in 2008, check numbers 1741, 1799, 1934, and 1948.

The last two checks, of \$75,000 in April and \$25,000 in June 2008, were not placed against any invoice given to Mara by Atlantic.

Atlantic had already testified that some work was paid against the original contract but the ledge and boulder removal was intermingled in the checks to Atlantic and could not be attributed to a specific invoice.

Perrotti offered testimony and evidence to support his contention that, as a result of Atlantic's breach of contract, the project failed and the Defendants suffered a loss of profit of \$855,000. This claim is supported by the estimate of Universal Excavating, Inc. of Cranston, Rhode Island which gave an estimate to Perrotti of \$59,250 to complete the project and Perrotti's own calculations as to what it would have cost to complete the Project, what the units could have been sold for and what profit would have devolved to the Defendants.

Mr. Perrotti also charges Mr. Grundy personally for fraud and misrepresentation regarding the percentage of work completed by Atlantic as related in the invoices submitted by Atlantic averring that the project was not 92% completed as declared in the last invoice of Atlantic, invoice number 9883 of June 19, 2008.

Perrotti also claims he was unable to obtain a certificate of occupancy from the City of Cranston because Atlantic failed to provide Mara with the "as built" determined on completion of construction which was essential for the City of Cranston to issue the certificate.

Perrotti testified he was hired as a consultant for the successors in title to finish the project but could not do so because of the lack of "as built" from Atlantic.

On examination, Perrotti admitted he never asked Atlantic for the "as built" which was in Atlantic's possession per Mr. Grundy.

The Court, after hearing testimony and argument and reviewing the exhibits in this case over a day and a half of hearings, reaches the following decision.

The Court finds as a fact that Atlantic and its principal, Mr. James Grundy, were competent and experienced in construction site preparation, road and sewer construction, and HVAC installation. The Court finds that at all times Atlantic performed its contractual responsibilities in a workmanlike manner in all respects; that the testimony of Mr. James Grundy was knowledgeable, professional and extremely credible in all respects; that the many invoices submitted by Atlantic were accurate representations of the work done by Atlantic and were accurate in their projection of work done on the project per the percentages noted on the invoices.

The Court finds that Mara, Perrotti and Greenfield were not credible in the testimony of Perrotti who appeared to be confused and contradictory in his testimony regarding times, dates, monies expended, and for what purposes or invoices.

Perrotti could not tell how much he paid on the project to Pioneer or Patriot for the blasting and crushing on what turned out to be an inordinate and unexpected amount of boulder and ledge which was costly to the project and hampered all parties in the project's completion.

The Court further finds that Perrotti entered into the contracts with Atlantic on behalf of Mara but is personally liable for the contracts because his corporation, Mara, was not in existence at the time of the contracts being signed by Mr. Perrotti as shown by evidence provided by Atlantic from the Rhode Island Secretary of State. The Court further finds that Perrotti held himself out to Mr. Grundy as being personally responsible for the contracts by his course of conduct with Mr. Grundy in dealing with the contracts.

The Defendant, Mara, through its principal, Perrotti, was ill-equipped and inexperienced and unable to properly supervise and pursue the project to a successful completion.

The extreme amount of ledge and boulder which needed to be removed, the very large problems with a serious lack of water pressure at the site necessitating changes to plan and designs, as well as the unexplained expenditure of funds from the two Sovereign Bank loans to Mara, et al. conspired to cause the project to halt prior to its completion.

The actions or inactions of Atlantic in the performance of its responsibilities did not cause Sovereign Bank to accelerate its loan and refuse further financing to the Defendants.

The Defendants' action against Mr. Grundy personally is denied and dismissed, there being no credible evidence to support this action. The counterclaim for loss of profits for failing to complete the project is denied. The evidence of the Defendants to support this claim is without foundation and the estimate, so-called, by Universal Excavating, Inc. to complete the project is insufficient to support a claim by the fair preponderance of the evidence.

The failure of the Defendant to obtain the "as built" from Atlantic lies with the Defendant because he never asked for them and therefore Atlantic cannot be held responsible for their absence, in addition to the fact that said "as built" could have been determined by the Defendant through other, perhaps more costly, means.

The controversy concerning the number of ejector units left on the site—Atlantic says two were left, Defendant denies there were two left on site—cannot be determined. However, in equity, the Defendant will be given a credit for one unit, in addition to the six units destroyed in the fire, for a credit in total of \$24,500.

The Court finds as a fact and as a conclusion of law that the claim of Atlantic has been proved against Perrotti personally for the amount of \$161,000 minus a credit to the Defendants of \$24,500 for a total recovery of \$136,500 plus interest and costs as applicable.

Counts III, IV, and V of Atlantic's Complaint are denied and dismissed as are all claims of the Defendants.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Atlantic Control Systems, Inc. v. Mara General Contractors, Inc., et al.

CASE NO: PC-10-4371

COURT: Providence County Superior Court

DATE DECISION FILED: November 24, 2014

JUSTICE/MAGISTRATE: Darigan, J. (retired)

ATTORNEYS:

For Plaintiff: David P. DeStefano, Esq.

For Defendant: Mark B. Morse, Esq.