DHE Homes, Ltd. v Jamnik
2011 NY Slip Op 32416(U)
September 6, 2011
Sup Ct, Nassau County
Docket Number: 8542-2007
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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TRIAL PART: 14

DHE HOMES, LTD., and Daniel Horowitz, individually,

NASSAU COUNTY

Plaintiff,

INDEX NO: 8542-2007

-against-

ALAN JAMNIK, ROCHELLE JAMNIK, and "JOHN DOE #1" through "JOHN DOE #10", said names being fictitious and unknown to Plaintiff, the persons or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the premises described in the Verified Complaint,

Defendants.

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DECISION AFTER TRIAL

This non jury contract action was tried before this court on June 6, 7, 8, 13 and 14, 2011. The plaintiffs, DHE Homes Ltd. and Daniel Horowizt, were represented by counsel and the defendant, Alan Jamnik represented himself. Defendant is self employed in a family retail business. He has an undergraduate degree, a Masters degree and a *juris doctorate* but he never practiced law.

On May 21, 2003 the parties entered into a written contract requiring plaintiff, DHE Homes Ltd. to demolish an existing home, remove the foundation of that existing home, remove an existing tennis court and build a new approximately 5,000 square foot home with an unfinished basement for the defendant. The written agreement (Exh 1) is a standard form Construction Contract. In relevant part, paragraph 15 establishes the payment schedule. The total due upon completion would be $435,000. Paragraph 8 described the agreed upon schedule with construction to be completed 12 months after beginning but in any event no later than fifteen months after commencement. If the job continued beyond fifteen months the owner would deduct $2,500 per month from the contract price with certain exceptions. One of the exceptions states that the penalty would not apply if the work

stoppage was the result of labor or material shortages which are unavoidable with the exercise of reasonable diligence. The parties eventually entered into three separate writings which were admitted into evidence concerning the work to be done by plaintiff. They are the above referenced original contract (Exh 3) dated May 21, 2003. They executed an "Addendum to Contract" (Exh 4) apparently mis-dated May 19, 2003. On May 21, 2003 they executed a hand written letter wherein the defendant agreed to pay $150,000 in addition to the $435,000 contract price bringing the agreed upon total to $585,000 (Exh 6). And finally there is the "Agreement Between DHE Homes and Alan Jamnik" dated February 16, 2005.

Prior to entering into the contract the plaintiff, in order to properly bid the job, reviewed a set of architectural drawings done by Jamnik's architect, Mr. Gregory Andreas. Prior to signing the contract plaintiff immediately expressed concerns about the structural elements of the drawings. Specifically, he testified that he told the defendant that he believed the structural components were inadequate and that the home could not be built this way. Plaintiff wrote a letter to defendant explaining this and awaited a response When the architect did not respond to the plaintiff's letter, plaintiff, with no objection from the defendant, hired a structural engineer to review the existing plans. The engineer did so, and on August 28, 2003 he was retained by plaintiff to prepare new drawings to address the structural issues. (Exh 72). Again, the defendant did not object. Although demolition had started in June or July soon after the contract signing plaintiff testified that these new drawings and specifications had the effect of significantly stalling the beginning or continuing of the framing of the house. For example, certain steel had to be fabricated, not merely purchased. In addition to this, the plaintiff testified that once the work was begun the plaintiff made many changes to the original plan and specifications that also greatly slowed the progress of the job. He testified, for example, that after the basement had been framed the defendant decided to add a back staircase to the house which required the ripping up of the floor, a revision of bathroom layouts, change in plumbing and windows. He said this was but one example of many. He introduced into evidence approximately 50 "change orders" into evidence. He described the procedure for these to be that when the defendant wanted to make a change in the plans or the specifications he would give plaintiff a drawing; they would meet to discuss it; plaintiff would research the price and produce a work/change order based on their conversation. He testified that the defendant would rarely sign

them but the work would not be done unless plaintiff had received verbal approval. Plaintiff testified that he believed that the defendant paid for all but a very few of the changes. Those that were not paid were included in the lien placed against the property.

The defendant moved into the house in November of 2004 and the certificate of occupancy was granted by the Town of Oyster Bay on November 12, 2004. The plaintiff testified that at the time the defendant moved in plaintiff was owed final payment on the project. Payment was not forthcoming. Rather, he testified, the defendant submitted to him several "punch lists" of items that defendant wanted changed or fixed prior to making payment. The plaintiff testified that he became frustrated with the ever changing demands of defendant and in February of 2005 demanded a final list. (Exh 64). According to the plaintiff, at this time there was owed about $50,000 on the balance of the original contract plus thousands of dollars for additional labor and increased costs to plaintiff as a result of the amount of time the project took. This was mostly reflected in the increased costs in raw materials during this period. In particular plaintiff cited that the cost of sheet rock, lumber and concrete increased drastically during the construction. The defendant had unresolved complaints as well, including wanting the attic finished which the plaintiff refused to do. In an attempt to resolve their differences, the plaintiff testified that he offered a resolution to their stalemate which was embodied in Exh. 65. This agreement states that the parties were each giving up certain claims by executing the agreement. The contractor was to supply and install all materials necessary to complete a room located above the owner's garage and shingle and re-roof a small outside storage shed that was in disrepair. The owner waived any right to have the attic sheetrocked and any claim for monies as a result of late delivery of the house. The agreement further acknowledges that the contractor is owed $50,870.00 for the balance of the original contract and payment will be made as follows: $15,000 upon the signing of Exh 65, $10,000 upon completion of the room above the garage; and the remainder "in accordance with the terms of the original contract."

According to the plaintiff, when he completed the room above the garage plaintiff asked for payment pursuant to the agreement. The defendant refused stating that the shingles that he used for the shed were not equal to those used on the house. At this point, the plaintiff stopped working and filed his lien and then the law suit. The complaint demands payment in the amount of $133,724.00 which was arrived at as follows: $35,870 for the balance on the original contract plus approximately

$100,000 in costs of labor and materials for work performed resulting from changes to the original plan or specifications. These items are specifically identified in Exh 95 (Itemized statement of lien).

The defendants counterclaimed for breach of contract claiming that plaintiffs failed to perform, constructively abandoned the work, failed to employ suitable materials, failed to hire and supervise qualified personnel and failed to construct the home in accordance with the contract. They claim damages in the amount of $112,000 having "incurred and expect to incur damages to complete, correct, repair or replace the work." Defendants additionally claimed that the time of delivery clause in the contract was breached which called for a $2,500 per month penalty if the work was not completed within 15 months "for any reason."

In his direct examination, the defendant offered testimony in support of his claim. He contradicted the plaintiff on several issues. He agreed that plaintiff expressed many concerns about the drawings. Defendant testified that he was surprised concerning the engineer's report but he never got a second opinion and never questioned his own architect about it. He denied being told that it was going to seriously slow the project or that steel was going to have be made for it. Defendant began by showing a video, made approximately two years after he moved in, purporting to show areas of damage to his home as a result of the plaintiff's work. Among the most significant complaints are summarized as follows:

- liner for drainage system not installed leading to water in basement
- stains on carpeting beneath window
- A/C units are Lenox, not Carrier as per contract
- A/C units sit on fiberglass, not concrete pads as per contract
- ladder missing from second window
- insulation foam is exposed
- basement expander tank flooded; additional unit needed
- shower makes noise heard beneath it; waste lines not wrapped
- mud room not constructed
- fireplace tiles not straight
- window on main floor does not open
- second floor shower does not work

- house water pressure not sufficient
- room above garage cold
- attic- never finished
- bathroom tiles not sealed
- basement storage room never build
- attic not sheet rocked or insulated
- finished room above garage is cold
- shelving in closet and garage were not done

The defendant has not expended any money for repairs or completion of the allegedly incomplete work.

In addition to his own testimony, defendant attempted to call as an expert witness Mr. Robert Dykeman, a self employed commercial contractor. The witness has an on going business relationship with the defendant in that he has built and expects to continue to build the stores that the defendant owns and operates. He visited the residence in March of 2009, approximately four years after the construction was completed. After testifying that he could not say when certain things he observed first needed to be repaired, the witness estimated the price to complete the work according to the contract as being $103,503 and produced a "punch list" with itemized estimates. He admitted that he had never built anything but retail commercial buildings and had no experience in estimating or building residential homes. He is not licensed as a home improvement contractor or builder in Nassau County. Based upon these facts the court allowed him to estimate costs for certain of these repairs but in view of the fact that he had never built a residential property and was not licensed to repair or construct residential property the court could not consider his testimony as an expert in the field.

During his rebuttal testimony the plaintiff responded to these complaints. For example, he testified that the Lennox air conditioner units he used were more expensive, had a higher efficiency rating than that of Carrier and that the defendant was advised of the change and did not object. Nor did the defendant object to the use of fiberglass pads as opposed to concrete. On several issues the testimony of each party was unsupported by independent proof. For example, the plaintiff testified that the waste lines were insulated and the defendant stated that they were not and one could hear

water running in the ceiling. On this issue defendant may have met his burden of proof by simply cutting a section of the ceiling and photographing the pipe to show that there was no insulation. He did not do so and thus failed to meet his burden on this issue. Likewise, he claimed that the water in his basement was caused by the incorrect installation of the drainage system around his home. He testified that there was no liner installed around the drainage pipe. He stated that coincidentally he had just watched HG TV and the show had a segment on installing a drainage system like his. Defendant stated that he was present when the drain was installed and therefore knew that there was no liner. The plaintiff pointed out that the liner was never included on any of the punch lists exchanged between the two of them prior to the litigation. He also testified that he was there when the drain was installed, that it was 9' deep and that he saw the filter fabric wrapped around the pipe. His opinion as to the water in the basement is that the final grading done by the defendant's contractor was done too close to the foundation. He also pointed out that the drain was put in 2003 and there was never a complaint about water leaking until years later. Here again the court finds that the defendant did not meet his burden on an issue that possibly could have been resolved in his favor by digging to the drain and photographing it to establish the lack of a liner. He did not do so. Additionally, the video he did offer in evidence showed very little water staining and in the court's view did not establish anything.

CONCLUSIONS OF LAW

General Business Law Article 36-A is entitled "Home Improvement Contracts." It is uncontroverted that the instant contract falls within the purview of the General Business Law Article 36-A. The contract executed by the parties is enforceable, and contains all the material terms as set forth by Section 771 of the General Business Law. (*Wowaka & sons v. Pardell*, 242 A.D.2d 1 [2d 1998]). In pertinent part, section 771 (1) (f) provides that if progress payments are to be paid by the owner to the home improvement contractor, "The amount of such payments shall bear a reasonable relationship to the amount of work to be performed, materials to be purchased, or expenses for which the contractor would be obligated at the time of payment."

" 'The best evidence of what parties to a written agreement intend is what they say in their writing.' " *Greenfield v Philles Records*, 98 NY2d 562 (2002), quoting *Slamow v Del Col*, 79 NY2d 1016, 1018 (1992). "When the terms of a written contract are clear and unambiguous, the intent of

the parties must be found within the four corners of the contact, giving practical interpretation to the language employed and the parties' reasonable expectations" *Franklin Apartment Associates, Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 861 (2nd Dept. 2007); *Gutierrez v State of New York*, 58 AD3d 805, 807 (2nd Dept. 2009). "A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v Philles Records, supra,* at p. 569. " '[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.' " *Willsey v Gjuraj*, 65 AD3d 1228 (2nd Dept. 2009), quoting *Henrich v Phazar Antenna Corp.*, 33 AD3d 864, 867 (2nd Dept. 2006); *see, Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004).

While plaintiff s have the burden of proving damages at trial with reasonable certainty *(City of New York v. State of New York*, 27 A.D.3d 1, 2), defendants bore the burden of proof on their counterclaims, including the burden to submit adequate evidence concerning damages. *Feldin v. Doty*, 45 A.D.3d 1225, 1226. The proper measure of damages in this construction contract action is "the difference between the amount due on the contract and the amount necessary to properly complete the job or to replace the defective construction, which ever is appropriate." Id. At 1226, quoting, *Sherman v. Hanu*, 195 A.D.2d 810.

While the court finds that both parties have breached parts of all three of the writings between them the terms of the original contract must be enforced where possible. Looking first at the plaintiff's claim, the mechanics lien alleges damages in the amount of $134,618.78. There is a mathematical error contained in that figure and the court reduces the lien to $133,724.00. Of that figure, the court accepts the plaintiff's proof with the exception of the following items:

- lumber in the amount of $16,174.99
- concrete costs in the amount of $7,500
- sheet rock in the amount of $5,000
- additional carpentry in the amount of $10,000

These costs are not allowed because the contract does not have a clause that allows for an increase in costs due to market conditions.

As to the $17,600 charge for the room above the garage, the plaintiff is likewise denied

recovery. In the February, 2005 agreement (Exhibit 65), the room above the garage was included in the $35,870 outstanding balance on the original contract which the defendant is being ordered to pay. Plaintiff testified that this figure was arrived at by estimating his cost as $110 per square foot for 160 square feet. The only work done on the room was the floor and sheet rocking. He did not install electrical connections, CAT or telephone wiring or lighting fixtures as the February agreement calls for. There is therefore insufficient evidence upon which to award him costs for the materials he used.

The defendant's counterclaims must first be analyzed in relation to the applicable statute of limitations While the statute for breach of contract is six years, a new home warranty is for six years free from material defects. For breach of implied warranty of merchantability for new homes the statute is one year. This would apply to defects allegedly caused by defective construction. There is a two year limitation on complaints relating to plumbing, heating, electrical, cooling and ventilation system due solely to faulty installation of such systems. General Business Law §777-a. The contract was entered into on May 21, 2003. The counterclaim was filed July 19, 2007. After considering the proofs and testimony the court finds that defendant has failed to provide sufficient proof as to any breach as to the plumbing, electrical ,heating, cooling and ventilation systems of the home pursuant to General Obligations Law §777-a. As to the defendant's request for damages resulting from late delivery of the home the court finds that there can be no award for late delivery under the contract because the original delay was caused by the need for a new structural plan which was accepted by the defendant.

The court has reviewed the case law provided by the defendant and finds it unpersuasive. He argues that the plaintiff cannot recover here because he failed to complete the work as specified in the contract, citing *A.Palmieri Landscaping v. Canoni* 819 NYS2d 846 (2006), a City of Mount Vernon opinion. However, in that case the contractor's work was not in conformity with local building codes and the owner was unable to obtain a certificate of occupancy due to the faulty work. The court held that the contractor could not sue for the balance owed him. The case is not analogous to the facts at bar. There is no allegation whatsoever that all of the work done by plaintiff was not to code. Defendant argues that plaintiff should not be able to argue the concept of 'substantial performance of the contract' to collect on his lien, citing *Cramer v. Esswein,* 220 AD 10 (1927). In

that case the contractor failed to heat a bathroom in the dwelling pursuant to the contract, again dissimilar to the facts here. The defendant cited several cases in support of the proposition that the plaintiff had not produced "any evidence to substantiate their claimed additional costs or damages." (Post trial memo)

He cited the case of *Philman v. Connery,* 111 NYS 654 (1908) for the proposition that damages cannot be sustained by the plaintiff's conclusion or general estimate. *Philman* was essentially a small claims action involving a claim for $128.69 by a contractor against a home owner. The home owner counterclaimed and was allowed to testify as to what it would cost to repair the damage done by the work of the plaintiff. The court held:

> "There was no evidence to show the damage which the defendant claims resulted to him from the negligent manner in which the plaintiff performed his work. Against the objection and over the exception of the attorney for the plaintiff, the defendant was allowed to state his conclusion or general estimate as to the damage which he claimed he sustained. This was not competent evidence, and the trial court should not have permitted the conclusion of the defendant to be substituted in lieu of legal."

The case is clearly distinguishable from the case at bar. Here, the plaintiff has been in the home building business for twenty five years. He was deemed an expert without objection at the trial. He was, based upon his experience and knowledge, competent to estimate work and related costs. His testimony on the issue of damages was competent. See *Trode v. Omnetics, Inc.,* 106 AD2d 808 (1988 3d Dept*),* where one of the issues in the case was the estimated value of a piece of heavy machinery. The plaintiff called an "experienced contractor conversant with the type of machinery in question and had personally seen the plaintiff's equipment at a previous construction site. As such, he was sufficiently qualified to render an opinion as to value. Id., at 809. Likewise, in the case of *Babbie v. Maraia* 157 AD2d 691 (2d Dept. 1990), the issue was the amount of property damage resulting from an auto accident. The plaintiff had been in the auto repair business for 30 years and testified himself that the cost of the repairs to his car, some of which he did himself and some which he had done by outside contractors, was $6,000. The defendant maintained that plaintiff did not sustain his burden of proof on the amount of damages. The appellate division held that his testimony was sufficient on the amount of damages, citing *Trode.* Conversely, the defendant's reliance on *Alexander's Department Store v. Ohrbarch's,* 269 AD 321 (1st Dept. 1954) is not applicable. That

case involved a lawsuit for damages over the economic loss suffered by the plaintiff when the defendant conspired to refuse to supply him with a clothing line which had made up a significant part of the plaintiff's profits. Those kind of damages are not analogous to the facts at bar.

Based upon the relevant testimony and submitted proofs, the court finds that the defendant is entitled to certain credits as against the plaintiff's lien. They are as follows: $4,000 for those items not completed in the February, 2005 punch list; $1,250 for the cupola that was not installed; $1,250 for the window/ ladder which was not installed; $3,500 to replace or repair the window where water is collecting and $3,500 for the mechanical room construction did not match the specifications contained in exhibit 79.

The plaintiffs lien is therefore reduced as follows:

Lean $133,724.00
- $17,600.00 Room above garage
- $16,174.00 Lumber
- $7,500.00 Concrete
- $5,000.00 Sheetrock
- $10,000.00 Additional Carpentry

$77,450.00

Defendant seeks credit for several items that he alleges were not completed pursuant to the contracts. The significant ones are shutters; drain to drywell; insulation of first floor; door hardware; brick work outside; cupola and sheetrock to attic. Of these, the court finds that he has adequately provided proof of value of the following items only. As to the others, he has failed to prove that the items were installed incorrectly or has failed to provide any proof of value. Therefore, the defendant is awarded credit for the following:

- $4,000.00 Punch List
- $1,250.00 Cupola
- $1,250.00 Window Ladder
- $3,500.00 Reinstall window/water damage
- $7,700.00 shutters
- $500.00 door hardware

$18,000.00 credit to defendant

$77,450.00
- $18,000.00 credits
$59,450.00

Plaintiff DHE Homes LTD. is awarded a money judgment in the amount of $59,450 with statutory interest of 3%.

As to the individual plaintiff, Daniel Horowitz, who was added as a party pursuant to the stipulation executed by the parties on April 27, 2009, he has no claim against the defendant homeowner. There is no evidence introduced at trial that Daniel Horowitz was licensed as a home improvement contractor as required by the Nassau County Administrative Code §21-11.2. Licensing statutes concerning home improvement unequivocally place the burden on the contractor to ensure that licensing statutes are strictly complied with. A contractor who is unlicensed in the municipality where the work is performed is barred from recovery in contract or under theories of quantum meruit and unjust enrichment. (*Vatco Contracting LTD., v. Kirschenbaum*, et. Al., 73 A.D.3d 1163 [2nd Dept 2010]).

The parties' stipulation of April 27, 2009 also provided that "all Affirmative Defenses, Offsets and counterclaims of Defendants against plaintiff shall be deemed to have also been made against Daniel Horowitz in his individual capacity." However, Daniel Horowitz, in his individual capacity, was was never a party to the contracts signed, but rather his signature appears on the contract as President of DHE Homes LTD. In order to hold the individual plaintiff liable for any breach of contract, defendant would have to pierce the corporate veil. The doctrine of piercing the corporate veil is a doctrine employed by a third-party to go behind the corporate existence in order to circumvent the limited liability of an owner in order to hold the individual liable for some corporate obligation. *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]; *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122 [2nd Dept. 2009]. An attempt to pierce the corporate veil does not constitute a cause of action independent of that against the corporation. *Hart v Jassem*, 43 AD3d 997, 998 [2nd Dept. 2007]. Rather, it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on the owner. *Old Republic Nat. Title Ins. Co. v Moskowitz*, 297 AD2d 724, 725 [2nd Dept. 2002].

Moreover, those seeking to pierce the corporate veil bear a heavy burden of showing that a

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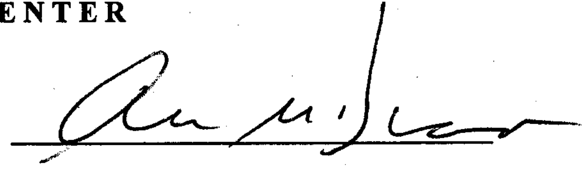
corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences. *Shkolnik v Krutoy*, 65 AD3d 1214 [2nd Dept. 2009]. Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance. *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 [1998].

Here, there is no evidence or testimony at trial that asserts or suggests that the individual plaintiff, Daniel Horowitz, failed to respect the separate legal existence of the corporation, treated corporate assets as his own, did not respect corporate formalities, or, in any other way, abused the privilege of doing business in the corporate form. *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 24 [2nd Dept. 2008]. Therefore, the defendants remaining claims are dismissed.

This constitutes the decision and order of this Court.

ENTER

DATED: September 6, 2011



HON. ARTHUR M. DIAMOND

J. S.C.

ENTERED
SEP 13 2011
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