R.B. Conway & Sons, Inc. v New York City Dept. of Parks & Recreation
2014 NY Slip Op 31585(U)
June 20, 2014
Sup Ct, New York County
Docket Number: 111994/2010
Judge: Shirley Werner Kornreich
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SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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R.B. CONWAY & SONS, INC.,

Index No.: 111994/2010

Plaintiff,

DECISION & ORDER

-against-

NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, PRIMER CONSTRUCTION CORP., WESTCHESTER FIRE INSURANCE COMPANY, VACHRIS ENGINEERING, P.C., and VICTOR A. GORDON, P.E., P.C.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 002, 003, and 004 are consolidated for disposition.

Defendants Primer Construction Corp. (Primer) and Westchester Fire Insurance Company (WFIC) (collectively, the Primer Defendants) move, pursuant to CPLR 3212, for summary judgment on the claims asserted against them by plaintiff R.B. Conway & Sons, Inc. (Conway). Seq. 002. Defendant Vachris Engineering, P.C. (Vachris) moves for summary judgment on its counterclaims against Conway and dismissal of Conway's claims. Seq. 003. Finally, Conway moves for partial summary judgment against the Primer Defendants. Seq. 004. For the reasons that follow, Vachris' motion is granted, Conway's motion is granted in part and denied in part, and the Primer Defendants' motion is denied.

I. Factual Background & Procedural History

The following facts are undisputed.

This action concerns the reconstruction of a boathouse in Flushing Meadows Park. Primer was hired by the New York City Department of Parks & Recreation (DPR) as the general

contractor. WFIC issued a surety bond guaranteeing Primer's payment obligations to its subcontractors. Pursuant to a subcontract, dated July 8, 2009 (the Conway Agreement), Primer hired Conway to drive 46 piles into the ground to support a boat ramp. Primer, who DPR had agreed to pay $200 per linear foot driven, agreed to pay Conway $88 per linear foot. Conway was required to hire an engineer to observe the driving. Conway initially hired defendant Victor A. Gordon, P.E., P.C. (Gordon), who has been in default in this action since March 2012. *See* Dkt. 11.

Gordon oversaw the driving of the first 21 piles. While the first two piles were being driven, a DPR engineer named Michael Rahbini was onsite to observe. Rahbini noticed the soft and inconsistent soil conditions, and opined that "in order to reach 15 tons on each pile, we must reach 6 blows per foot at an average depth of 120 linear feet." DPR did not, however, conduct a soil analysis before the driving commenced. The first 21 piles were then driven to a depth of approximately 115 feet based on the requisite 6 blows per foot.[1] Following the driving of the first 21 piles, on December 24, 2009, Conway retained Vachris to oversee the driving of the final 25 piles. There is no evidence indicating that the services performed by Gordon and Vachris were problematic or deviated in any way from their applicable professional standards.

After the work was completed, DPR refused to pay Primer for more than the 80 linear feet that DPR, on its own and without first analyzing the soil, originally estimated to be the depth the piles were to be driven. Primer and DPR eventually resolved their dispute, with DPR agreeing to pay Primer for 97 linear feet at the agreed-upon $200 rate. Nonetheless, Primer did not fully pay Conway, insisting that Conway was not entitled to be paid for driving beyond the

[1] To explain, you drill until it takes six blows of the hammer to drill one foot.

97 feet that Primer and DPR settled for. Nothing in the Conway Agreement conditions Conway's entitlement to full payment on DPR's full payment to Primer.[2] Conway, in turn, has not paid Vachris at all.

Conway commenced this action on September 10, 2010. On December 19, 2011, Conway filed an amended complaint, adding Vachris as a defendant. On February 22, 2012, Vachris filed an answer and counterclaim for non-payment against Conway. The parties' pleadings, many of which were not e-filed until the instant motions were brought, also contain myriad cross and counterclaims, most of which lack factual detail and evidentiary support.[3] The only viable claims are the breach of contract claims for non-payment. The other tort and quasi-contract claims are dismissed. For the reasons set forth below, there is no question of fact that Primer must fully pay Conway and Conway must fully pay Vachris and that pre-judgment interest should be paid on such amounts.

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law.

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[2] Primer's contention that it settled with DPR for Conway's benefit is wholly without merit. Primer's obligation to pay Conway the full contract amount is not impacted by DPR's own (seemingly) unjustified refusal to pay Primer for all of the work performed. Had Primer intended to condition full payment to Conway on full payment by DPR, the contract should have said so (as many similar subcontracts indeed provide).

[3] For instance, Vachris' supposedly negligent work is not alleged with any detail, and no evidence in discovery has been produced to substantiate such claim. Conway merely sought to pass its loss onto Vachris. As a result, Vachris incurred substantial litigation expenses to recover the $10,000 and defend against alleged liability far in excess of that amount.

Zuckerman v City of New York, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Vachris' is entitled to summary judgment against Conway for the full amount owed, $10,000. *See* 5/1/14 Tr. at 4-5. Conway asserted no valid legal justification for not paying Vachris.

Likewise, Conway is entitled to be paid in full by the Primer Defendants. The Primer Defendants, in opposition, do not set forth a valid reason for not paying Conway,[4] nor do they refute the amounts sought on this motion. Conway is directed to submit a proposed judgment

[4] Primer's *res judicata* and collateral estoppel arguments border on the frivolous. Neither doctrine applies to Conway's claims because (1) Conway was not a party to Primer's dispute with DPR; and (2) no final, appealable administrative ruling was issued because Primer and DPR settled. *See generally Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 347-50 (1999).

setting forth the total amount owed, upon which 9% pre-judgment interest will accrue from January 28, 2010.[5] Additionally, Primer is liable to pay for Conway's attorneys' fees in this action pursuant to section 11.9 of the Conway Agreement. The calculation of such amounts is referred to a Special Referee to hear and report.

Next, the Primer Defendants' summary motion is denied and the court, *sua sponte*, dismisses the remaining claims in this action.[6] The Primer Defendants' theory of the case – that Conway and its subcontractors, Gordon and Vachris, performed unnecessary "extra work" – is simply untenable. Primer's subcontractors performed the work with which they were tasked, and no evidence has been proffered that such work was deficient in any way. Indeed, not even DPR contended that the work was deficient. Primer proffers no legitimate objection to Conway's work, and Conway proffers no legitimate objection to Vachris' (or Gordon's) work. The parties' experts mostly opine on inapposite matters and, significantly, their opinions are not based on actual knowledge about the soil conditions.

In any event, none of this matters because the over-driving issue was a conflict between DPR and Primer, not Primer and its subcontractors. Primer, nonetheless, now avers that DPR's refusal to pay it for the 115 feet of driving somehow retroactively renders its subcontractors' work improper. Yet, Primer itself argued to DPR that its subcontractors' work was indeed necessary and proper and only reversed course and impugned the integrity of its subcontracts

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[5] Such amount shall also include pre-judgment interest on Primer's partial payments made during this litigation.

[6] Although Gordon has defaulted, there are no damages which can be proved. Therefore, the claim against him should be dismissed.

once it settled with DPR. Primer's argument is nothing more than a means to pass on its losses to its subcontractors, a result not supported by the contract.

It should be noted that there is no non-conclusory evidence in the record to support the contention that the 115 feet driven was excessive. In fact, the evidence suggests that 115 feet was actually on the conservative side of the requisite depth needed to ensure that the structure being built was safely supported. Regardless, these engineering matters have no bearing on Conway and Primer's rights to be paid in full for their work.

Finally, most of the amounts owed to Conway are undisputed. The minor disputed amounts – the only amounts on which Conway does not seek summary judgment – are not substantial enough to be tried, since the cost of a trial will likely exceed the amount in controversy. *See* Dkt. 110 at 2. The parties are urged to settle this dispute and, ideally, submit a joint proposed order since Primer's obligation to fully pay Conway cannot legitimately be contested.[7] Moreover, Primer is respectfully reminded that further nitpicking over its payment obligations to Conway is a futile endeavor since it will cost Primer more to pay for Conway's (and its own) attorneys fees' under section 11.9 than it might save by prevailing at trial. Accordingly, it is

ORDERED that the parties' summary judgment motions are decided as follows: (1) summary judgment is granted to defendant Vachris Engineering, P.C. (Vachris) against plaintiff R.B. Conway & Sons, Inc. (Conway), and the Clerk is directed to enter judgment in favor of Vachris and against Conway in the amount of $10,000 plus pre-judgment interest of 9% from

[7] The contested amounts themselves appear specious, such as Primer's attempted "backcharge," first asserted by Primer's prior counsel in March 2012.

January 28, 2010 to the date judgment is entered, and such judgment is hereby severed from the remaining claims in this action; (2) summary judgment is granted to Conway against defendants Primer Construction Corp. and Westchester Fire Insurance Company (collectively, the Primer Defendants) in the amount of the remaining amounts owed to Conway under the Conway Agreement plus its reasonable costs and attorneys' fees incurred in this action; (3) the Primer Defendants' summary judgment motion is denied; and (4) the remaining claims in this action, including those against Gordon, are dismissed; and it is further

ORDERED that the calculation of Conway's reasonable costs and attorneys' fees is referred to a Special Referee to hear and report; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing before the Special Referee; and it is further

ORDERED that within 20 days of the entry of the Referee's report on the NYSCEF system, Conway shall file (1) a motion to confirm or modify such report; and (2) a proposed order directing the Clerk to enter judgment in the amount due under the Conway Agreement with interest from January 28, 2010; and it is further

ORDERED that the Primer Defendants shall have 20 days to oppose Conway's motion and submit a proposed counter-order if Primer has a basis to dispute Conway's calculations, and Conway shall have 10 days to submit a reply; and it is further

ORDERED the parties will be contacted by the court to schedule a date for oral argument when the motion is fully submitted in Room 130.

Dated: June 20, 2014

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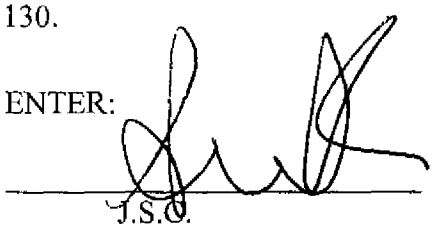

J.S.C.