Franco Belli Plumbing & Heating & Sons, Inc. v Citnalta Constr. Corp.
2014 NY Slip Op 30520(U)
February 28, 2014
Supreme Court, New York County
Docket Number: 107725/2011
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN PART 3
Justice

FRANCO BELLI PLUMBING &

INDEX NO. 107725/2011

MOTION DATE 12/4/2013

- V -

CITNALTA CONSTRUCTION CORP.

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ..... No(s) 1

Answering Affidavits - Exhibits ..... No(s) 2, 3

Replying Affidavits ..... No(s) 4

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the accompanying memorandum decision.

DATED: 2/27/2014

EILEEN BRANSTEN , J.S.C.

1. CHECK ONE : ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE : MOTION IS : ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE : ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

FRANCO BELLI PLUMBING & HEATING & SONS, INC.,

Plaintiff,

-against-

Index No. 107725/2011
Motion Seq. No. 001
Motion Date: 12/4/2013

CITNALTA CONSTRUCTION CORP., TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, and NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendants.

EILEEN BRANSTEN, J.:

In this breach of contract action, defendants Citnalta Construction Corp. ("Citnalta") and Travelers Casualty and Surety Company of America ("Travelers") seek partial summary judgment, pursuant to CPLR 3212(e), dismissing plaintiff Franco Belli Plumbing & Heating & Sons, Inc.'s claim for acceleration costs. Plaintiff, in turn, cross-moves for partial summary judgment in its favor on the issue of liability against Travelers. Defendant New York City School Construction Authority ("SCA") was stipulated out of the case sometime before the request for judicial intervention was filed on June 26, 2012. For the reasons that follow, both motions for summary judgment are denied.

I. FACTUAL BACKGROUND

After a public bidding process, SCA contracted with Citnalta for the construction of a new high school in Manhattan. Citnalta subcontracted with plaintiff for plumbing work on the project, by a written agreement dated January 18, 2007 (the "Contract"). *See* Complaint Ex. A (Contract).

Almost from the outset, extra work on the project arose. While these changes to the project usually resulted in changes to the schedule, SCA, at several junctures, also asked Citnalta to accelerate the work "in order to maintain the contractual substantial completion date." *See* Affidavit of Eddie Garcia ("Garcia Aff.") Ex. D (Notice of Direction, dated June 20, 2007). On several occasions, by email and letter, Citnalta directed plaintiff to perform acceleration work, or reassured it that its acceleration work would be paid for. *See* Affidavit of Paul Belli ("Belli Aff.") Exs. A, B & C.

On July 17, 2007, Citnalta sent SCA a proposal for estimated acceleration costs to bring the project back on schedule, amounting to $893,320.65 – $62,239.15 earmarked for plaintiff. *See* Garcia Aff. Ex. E. On November 26, 2007, Citnalta substituted a proposal for $393,925.51, based on actual invoices from its subcontractors for accelerated work performed, including $121,792.26 for plaintiff. *Id.* Ex. F.

On May 27, 2008, SCA responded to Citnalta's November 26, 2007 proposal and issued the acceleration change order in the total amount of $181,489.76. *Id.* Ex. I. SCA's acceleration change order addressed the "premium portion of overtime from 4/26/07 to

10/5/07, permits, additional foreman time and additional rental." *Id.* On December 1, 2008, Citnalta notified plaintiff that Citnalta was going to "close" (accept) SCA's May 27, 2008 acceleration change order. *Id.* Ex. M. Plaintiff's share was $19,400 – instead of the $121,792.26 included in the November 26, 2007 accelerated cost proposal to SCA – allegedly due to plaintiff's failure to provide certified payroll records to support its claim. On December 4, 2008, Citnalta signed off on SCA's May 27, 2008 acceleration change order. *Id.* Ex. O.

Meanwhile, on May 28, 2008, plaintiff submitted an acceleration cost proposal to Citnalta for $336,077.61 for: onsite labor costs from October 5 to December 31, 2007; on-site labor costs from January 1, 2008 to project end; "Inefficiencies Associated with Acceleration"[1] from October 5 to December 31, 2007; and inefficiencies from January 1, 2008 to project end. On November 22, 2008, plaintiff submitted another acceleration cost proposal to Citnalta for $760,305.56, covering "Plumbing Labor inefficiencies" for the entire length of the project to date and the cost of an extra foreman for sixty-four 48-hour weeks. *Id.* Ex. L.

On April 5, 2009, plaintiff submitted its final acceleration cost proposal to Citnalta for $941,417.28, covering: (1) offsite premium labor costs from April 17 to August 21, 2007;

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[1] Citnalta advised plaintiff to justify inefficiencies to SCA by claiming that, "[d]ue to acceleration, the sequence of work was compressed, congested the job site and as a result inefficiencies occurred . . ." Belli Aff. Ex. E.

(2) inefficiencies associated with acceleration prior to October 5, 2007; (3) onsite premium labor costs from October 5, 2007 to completion; (4) overtime for the duration of the project, reduced by the $19,400 paid by SCA under its May 27, 2008 change order, and the claimed amount in (3); and, (5) a second foreman for 64 weeks of 48 hours each. *Id.* Ex. R. Citnalta incorporated plaintiff's $941,417.28 request in a revised acceleration proposal to SCA for $3,084,119.70, dated April 17, 2009. *Id.* Ex. S. On October 22, 2010, Citnalta sent SCA a further revised acceleration proposal for $3,000,506.31, retaining plaintiff's $941,417.28 request. *Id.* Ex. X.

At a meeting on April 4, 2011, SCA informed plaintiff that Citnalta had signed off on SCA's acceleration change order excluding plaintiff's request for $941,417.28. *Id.* Ex. BB. This was reiterated by Citnalta in a letter to plaintiff, dated January 30, 2012.[2] *Id.* Ex. Q.

On July 5, 2011, plaintiff commenced the instant action asserting claims for breach of contract by Citnalta, in the amount of $615,603.56; for payment by Travelers under the payment bond it issued for the project; and, for foreclosure of the mechanics lien against Citnalta and Travelers filed with SCA on June 29, 2011. The Complaint charges that the original subcontract amount of $1,675,000.26 grew to $2,682,393.46 as a result of the changes. *Id.* ¶ 6. Citnalta paid plaintiff $2,066,789.90, leaving a balance of $615,603.56.

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[2] An acceleration change order was issued by SCA on January 23, 2012, in the amount of $685,760.00, apparently associated with a delay caused by a Consolidated Edison power failure, but not applying to plaintiff. *See* Garcia Aff. Ex. P.

Defendants now seek partial summary judgment, dismissing plaintiff's claim for acceleration costs. Plaintiff cross-moves, seeking summary judgment on its claim against Travelers, which issued a labor and material payment bond to Citnalta for the project. Complaint Ex. B (Payment Bond).

II. DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1st Dep't 2007) (citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v. Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008) (quoting *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 (1st Dep't 2002).

A. *Defendants' Summary Judgment Motion*

Defendants now seek dismissal of plaintiff's claim for acceleration costs. In simplest terms, Citnalta argues that plaintiff may be compensated only for acceleration costs for which Citnalta was paid by SCA. Plaintiff contends, on the other hand, that it contracted with Citnalta and should be compensated by Citnalta for any work done at Citnalta's request. Several portions of the Contract are at the center of this dispute:

> The Subcontractor hereby waives and releases any and all claims, causes of action, and rights to additional payment and time extensions beyond the contract amount, except to the extent that Citnalta Construction Corp. may receive additional funds or extensions of time on Subcontractor's behalf for Change Orders and extra work from the Owner or Architect/Engineer."

Contract, ¶ 8.2.

> It is expressly understood that the amount hereinabove stated for performance of the work herein represents the full consideration to be paid for said work and in no event shall there be any claims for 'extras' against Citnalta Construction Corp. unless Citnalta Construction Corp. agrees in writing to pay any extra amount. Any deviation from the foregoing provisions shall be null and void. Any changes, modifications or extensions of the work to be performed herein may only be done by written order specifically describing the work involved and executed by Citnalta Construction Corp. and the Subcontractor.

Id. ¶ 21.

> Citnalta Construction Corp. may, upon written request of the Subcontractor, appeal or contest on behalf of the Subcontractor from any ruling or decision the Owner or Architect/Engineer, or institute any action or proceeding to recover damages by reason of any affirmative claim by the Subcontractor, or

> by reason of any deduction or refusal to pay by the Owner, for any reason, involving the work or performance of the Subcontractor.

Id. ¶ 8.

Corresponding to the Contract's three quoted paragraphs above, Citnalta contends that: (1) it did not get paid by SCA for the acceleration work claimed by plaintiff; (2) Citnalta did not agree to pay for plaintiff's acceleration work; and, (3) Citnalta was not asked by plaintiff to contest SCA's rejection of payment for plaintiff's acceleration work. Citnalta maintains that it paid plaintiff for all work performed under the Contract, as Citnalta understands the Contract to mean, including two instances where acceleration work was indicated. *See* Belli Aff. Ex. A & B. Citnalta reads its Contract with plaintiff to oblige payment to plaintiff over and above the Contract amount only if agreed to in writing, pursuant to paragraph 21, and if paid for by SCA, pursuant to paragraph 8.2. Plaintiff reads the Contract to entitle it to get paid by Citnalta, even though SCA rejected the claims for plaintiff's work put forth by Citnalta.

1. "Pay When Paid" Clause

Defendants rely upon paragraph 8.2 as its primary shield against plaintiff's claim. It is undisputed that SCA did not pay Citnalta for most of plaintiff's alleged acceleration work throughout the project. Therefore, Citnalta, having not "receive[d] additional funds or extensions of time on Subcontractor's behalf for Change Orders and extra work from the

Owner," insists that plaintiff has "waive[d] and release[d] any and all claims, causes of action, and rights to additional payment and time extensions beyond the contract amount." Contract ¶ 8.2.

Plaintiff characterizes paragraph 8.2 as a "pay when paid clause," and argues that, as such, it has been held void as against public policy. *West-Fair Elec. Contrs. v. Aetna Cas. & Sur. Co.*, 87 N.Y.2d 148, 158 (1995) ("a pay-when-paid provision which forces the subcontractor to assume the risk that the owner will fail to pay the general contractor is void and unenforceable as contrary to public policy set forth in the Lien Law § 34"); *Hugh O'Kane Elec. Co., LLC v. MasTec N. Am., Inc.*, 19 A.D.3d 126, 126 (1st Dep't 2005) ("The general contractor seeks dismissal on the basis of a provision in the subcontract making its obligation to pay the subcontractor 'expressly contingent upon and subject to' its own receipt of payment from the owner for the subcontractor's work – a so-called 'pay-when-paid' provision. Such provisions are void in New York as against public policy").

Defendants maintain that the Contract does not involve "pay-when-paid," because plaintiff "mistakenly conflates its waiver of claims for delay, acceleration, or other extras against Citnalta Construction with the assumption or transfer of payment risk." *See* Defendants' Reply Br. at 8. Defendants read the contract as barring plaintiff "from recovering on claims on which it fails to establish entitlement." *Id.* at 9. However, this is not the Contract's language at paragraph 8.2. Ultimately, plaintiff did not get paid in full, as it calculated, because, in Citnalta's words, "SCA did not find that Franco Belli

substantiated that it was entitled to any acceleration costs." *See* Garcia Aff. Ex. Q (January 30, 2012 Letter). Under these circumstances, defendants cannot resort to the improper use of paragraph 8.2, that is by attempting to enforce a pay-when-paid policy.

2. Agreement to Pay for Acceleration Work

Citnalta acknowledges that acceleration work was needed because of unforeseen delays, particularly the presence of large rocks or boulders encountered during excavation, and a lack of electrical power from Con Ed. However, Citnalta takes no responsibility for these delays, relying on *Triangle Sheet Metal Works v. Merritt & Co.*, 79 N.Y.2d 801, 802 (1991) for the proposition that "absent a contractual commitment to the contrary, a prime contractor is not responsible for delays that its subcontractor may incur unless those delays are caused by some agency or circumstance under the prime contractor's direction or control."

Plaintiff contends that it is not delay that is at issue here. Plaintiff did not need more resources to complete its work as initially envisioned; Citnalta never accused plaintiff of lagging. Instead, it was Citnalta that requested a change in plaintiff's resources, "to increase manpower and/or work overtime to expedite completion of your contractual work immediately." Belli Aff. Ex. C. Citnalta was acting in response to the unforeseeable delay caused by the uncovering of large boulders during excavation, as urged by SCA. This sort of delay does not preclude recovery by plaintiff. *Corinno Civetta Constr. Corp. v. City of*

New York, 67 N.Y.2d 297, 310 (1986) ("[E]ven broadly worded exculpatory clauses, such as the one at issue in these actions, are generally held to encompass only those delays which are reasonably foreseeable, arise from the contractor's work during performance, or which are mentioned in the contract").

Following SCA's Notice of Direction, dated June 20, 2007 (Garcia Aff. Ex. D), Citnalta changed plaintiff's work force's deployment and scheduling, with assurances of compensation. For instance, on October 29, 2007, Paul Belli sent an email message to Eddie Garcia, Citnalta's project manager, stating: "We are beginning to work 2 hours over-time everyday to further accelerate the schedule. Franco Belli [Paul's father] told me that last week you stated that Citnalta would pay for these additional premium hours. Please confirm." Belli Aff. Ex. B. Gary Yerganian, executive vice president of Citnalta, replied one hour later by email, "Yes." *Id.* The exchange bore the subject heading: "Additional Accelerated Costs." Yet, defendants assert that Citnalta "did not agree to pay the Belli Claim [for acceleration costs]. The Belli claim was not the subject of a written order signed by Citnalta Construction Corp." *See* Defendants' Moving Br. at 13. This disclaimer, however, must be viewed as an attempt to belie the obvious. Plaintiff's disputed cost components, as identified in the April 5, 2009 proposal, were premium labor costs, stemming from the need for an additional foreman, as well as inefficiencies associated with acceleration and overtime. Citnalta's reliance upon *Triangle* does not apply here, because these disputed costs were needed to meet the original deadline, not to complete plaintiff's work on an attenuated

schedule. They constitute "extra work," as distinguished from "delay damages." *Sea Crest Constr. Corp. v. City of New York*, 286 A.D.2d 652, 653 (1st Dept 2001).

3. Failure to Appeal

Defendants maintain that plaintiff did not take any action to preserve its claim to the approximately $100,000 left out of the May 27, 2008 acceleration change order, as permitted by paragraph 8 of the contract. However, defendants contend that "[o]n November 9, 2010, Citnalta Construction made a renewed request to the School Construction Authority to review and settle the Belli Claim . . . [and] as of March 2, 2011, Citnalta Construction was still trying to arrange a meeting with the School Construction Authority concerning the Belli Claim." *See* Affirmation of Thomas D. Czik, ¶¶ 17 and 19. While plaintiff was not required to defer to Citnalta's attempts to first be paid by SCA for plaintiff's work, this should not preclude plaintiff from acting now to be properly compensated.

At various times throughout the project, SCA met and communicated with Citnalta, plaintiff and other subcontractors, often addressing costs. On May 5, 2010, there was a meeting dealing with plumbing-related acceleration costs, including plaintiff's pending $941,417.28 request, summarized by an email message from SCA to the participants. *See* Garcia Aff. Ex. T. At that meeting, plaintiff was asked to produce documentation for the on-site premium labor costs from October 5, 2007 onward, and for the second foreman needed

completed on overtime after Oct 5, 2008." *Id.* SCA announced, however, that it "will not even consider paying for any other trades OT after Oct 5, 2008 other then [sic] for the possible Con Ed delay," an issue specific to the elevator installers. *Id.* Later email messages from SCA to plaintiff and Citnalta indicate that the requisite documentation was not being supplied on a timely basis. *See id.* Exs. U & V.

At an April 4, 2011 meeting, plaintiff heard directly from SCA that Citnalta signed off on SCA's acceleration change order, which omitted plaintiff's request for $941,417.28. *Id.* Ex. BB. Thereafter, plaintiff asked Citnalta to "resolve this matter directly with us." Finally, on January 30, 2012, Citnalta sent a letter to plaintiff announcing that Citnalta had reached agreement with SCA on acceleration costs, excluding plaintiff's $941,417.28 request, as plaintiff had learned nine months earlier, because "SCA did not find that Franco Belli substantiated that it was entitled to any acceleration costs." *Id.* Ex. Q.

The record contains copies of email messages, letters and memorializations of meetings wherein plaintiff's requests for payment for acceleration work were conveyed to Citnalta, who then passed them to SCA, in one form or another. Often, Citnalta pressured plaintiff for documentation supporting plaintiff's requests, even while they were being rolled into Citnalta's comprehensive acceleration work proposals to SCA. On occasion, SCA directly asked plaintiff for the requisite documentation, but plaintiff apparently rarely, if ever, produced satisfactory acceleration work documentation for SCA or Citnalta. As a result, SCA approved little of plaintiff's purported acceleration work for payment.

Finally, regardless of the quality of plaintiff's appeals to Citnalta, ultimately Citnalta was responsible for paying plaintiff, under the properly-understood terms of the Contract, in spite of SCA's recalcitrant position. In sum, defendants have failed to establish their entitlement to summary judgment dismissing plaintiff's claim for acceleration costs.

B. *Plaintiff's Cross-Motion for Summary Judgment*

In support of its cross-motion for partial summary judgment against Travelers, plaintiff points to Citnalta's obligations under the Payment Bond. Plaintiff contends that Citnalta is obligated to pay for the labor and materials ordered by SCA and supplied by plaintiff for the project. This obligation, according to plaintiff, is not subject to any contractual waiver in the parties' Contract, including the "pay when paid" clause.

Defendants contend that the wording of the Payment Bond bars plaintiff's summary judgment motion. In particular, defendants note that under the Payment Bond, Traveler's liability is conditioned on a determination of the "sum or sums as may be justly due claimant." Payment Bond ¶ 2.

Here, there is a material issue of fact in dispute regarding the sums "justly due" plaintiff. In his testimony, Paul Belli said, in regard to Citnalta and SCA, "whatever I was asked for I always gave to them." *See* Belli Tr. at 61. Yet, the record contains several requests, throughout the life of the project, for plaintiff to provide more or better support for its acceleration cost claims. *See, e.g.,* Garcia Aff. Exs. K & T.

Paragraph 10 of the Contract provides that "[w]eekly submission of two copies of a certified weekly payroll report shall be a condition precedent to any payment by Citnalta Construction Corp. to the Subcontractor." Since it is undisputed that Citnalta paid plaintiff $2,066,789.90, this condition for payment was apparently satisfied over and over again. The Contract also provides at paragraph 22 that "Subcontractor shall keep full and accurate daily records of all work required for the job herein, including materials ordered and shall submit such record to Citnalta Construction Corp. upon request."

While Citnalta questionably claims that "Citnalta Construction paid Franco Belli Plumbing for all of this [directed acceleration-related] work," *see* Yerganian Aff. ¶ 3, plaintiff asserts, through Peter Belli's testimony, that it never was paid for any acceleration costs, *see* Belli Tr. at 46-47, ignoring for the moment at least the $19,400 paid under SCA's May 27, 2008 change order.

Even now, it is unclear how the acceleration cost reporting and compensation process involving plaintiff differed from the basic process of labor cost reporting and compensation under the Contract, which yielded $2,066,789.90 for plaintiff, leaving a claimed balance of $615,603.56. Without resolution of this material issue of fact, the amounts due plaintiff are not established and summary judgment on liability as sought by plaintiff must be denied. Plaintiff cites *Blandford Land Clearing Corp. v. National Union Fire Insurance Company of Pittsburgh, Pa.*, 260 A.D.2d 86, 95 (1st Dep't 1999), for the proposition that "the plain language of the payment bond creates an independent obligation to pay for labor and

materials furnished in connection with the contract for the improvement of the owner's real property subject to defeasance only upon payment by the contractor." Defendants counter with *A&S Stelco Constr. Corp. v. AXA Global Risks U.S. Ins. Co.*, 24 A.D.3d 216, 216-17 (1st Dep't 2005), where recovery on a payment bond was denied because "Plaintiff adduced no evidence that it was ever paid or had ever demanded payment on a unit price basis during the two-year period it worked on the project, and defendant adduced contemporaneous payroll records indicating that Plaintiff was paid biweekly on the basis of the number of hours worked." Neither of these cases are at odds with the court's instant decision that the sums "justly due" are still to be determined. It will be up to the fact finder in this action to determine the dimensions of plaintiff's claim for acceleration-related costs in light of the parties' respective adherence to the labor cost reporting and compensation practices under the Contract.

III. CONCLUSION

In conclusion, the Court denies defendants' motion for partial summary judgment dismissing plaintiff's claims for acceleration costs, and denies plaintiff's cross-motion for partial summary judgment on liability.

Accordingly, it is

ORDERED that defendants Citnalta Construction Corp. and Travelers Casualty and Surety Company of America's motion for partial summary judgment, pursuant to CPLR 3212, dismissing plaintiff Franco Belli Plumbing & Heating & Sons, Inc.'s claim for acceleration costs is denied; and it is further

ORDERED that plaintiff Franco Belli Plumbing & Heating & Sons, Inc.'s cross motion for partial summary judgment on liability against Travelers Casualty and Surety Company of America is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on April 8, 2014, at 10:00 A.M.

Dated: New York, New York
February 28, 2014

Hon. Eileen Bransten, J.S.C.