Hutchinson v Frissora
2015 NY Slip Op 31404(U)
July 27, 2015
City Court of Peekskill
Docket Number: SC-332-15
Judge: Reginald J. Johnson

PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK

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NANCY HUTCHINSON,

Plaintiff,

--against--

RALPH FRISSORA

Defendant.

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DECISION & ORDER

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Small Claims Part

REGINALD J. JOHNSON, J.

This is a Small Claims action commenced pursuant to Uniform City Court Act (UCCA), Article 18. Nancy Hutchinson ("Plaintiff") and Ralph Frissora d/b/a Arcanna Homes, Inc. ("Defendant") appeared pro se. Plaintiff called her husband, Steven Bucchieri, as a witness on her behalf. After a rejection of mediation by one of the parties, this matter proceeded to a bench trial.

For the reasons that follow, judgment for the Defendant.

The Court considered the following marked exhibits and trial testimony in support of its decision herein:

1. Plt's Exh. "1" copy of Arcanna Homes, Inc. Agreement
2. Plt's Exh. "2" through "13" photographs
3. Plt's Exh. "14" copy of contract between Plaintiff and A-Class Builders, Inc.

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4. Plt's Exh. "15" copy of letter from Harold, Salant et al.
5. Def's Exh. "A" copy of Arcanna Homes, Inc. Agreement[1]
6. Def's Exh. "B" copy of Plot Plan
7. Def's Exh. "C" copy of email dated June 29, 2014
8. Def's Exh. "D" copy of Chase checks on a single sheet

Trial

On July 17, 2015, a bench trial was conducted in this matter. By way of background, the parties entered into a Contract (Plt's Exh. "1"; Def's Exh. "A") on December 4, 2013 wherein Plaintiff agreed to pay the Defendant $44,000.00 for the construction of a 36'x40' garage on the Plaintiff's premises located at 7 Birch Trail, Carmel, New York 10512. The Contract stipulated, among other covenants and warranties contained therein, that

> **10) Contractors Warranties:**
>
> (a) Contractor warrants that the construction will be Performed in conformity (i) with the Contract Documents, (ii) with all laws, regulations, and codes applicable to the construction of the Garage, (iii) with any applicable restrictive covenants and homeowners' association documents, (iv) in a good and workmanlike manner, and (v) with new (unless otherwise specified)

[1] This copy of the Arcanna Homes, Inc. contract was executed by both parties, whereas Plt's Exh.

good quality materials.

11) **Exclusive Right to Build:** Owner agrees not to make any arrangements with any other party, other than the General Contractor, to improve the Premises or any of the structures thereon, or attempt to do so themselves without the express written consent of the General Contractor.

(Plt's Exh. "1" ¶¶10 and 11; Def's Exh. "A" ¶¶10 and 11) (Emphasis in the original).

Trial Testimony

Plaintiff testified that she wanted to build a garage on her property for her husband. On or about December 4, 2013, she contracted with Defendant to construct a 36'x40' or 1,440 sq. ft. garage on her property located at 7 Birch Trail, Carmel, New York 10512 for a total construction price of $44,000.00 (Def's Exh. "A" pp. 1-2 and 5). The Contract required the Plaintiff to pay the Defendant a 23% ($10,000.00) deposit upon execution of the Contact, $20,000.00 upon completion of the foundation, $11,000.00 upon completion of framing, siding, roofing, and a final payment of $3,000.00 upon completion of gravel or item #4 (Id. at p. 5).

"1" was unsigned by the parties.

The Plaintiff testified that she paid the Defendant an agreed upon reduced down payment of $5,000.00 upon execution of the Contract.[2] On or about April or May 2014, the Defendant marked out with orange paint the area of the Plaintiff's property where the garage was to be constructed. At some point thereafter, the parties discussed the need to have a trench dug around the perimeter of the property in conformity with the staked out perimeter lines. The parties disputed whether the staked out perimeter lines were professionally done by the Defendant.[3]

Shortly thereafter in either April or May 2014, the Plaintiff enlisted the aid of her neighbor, Dave, who dug a trench around the perimeter of the area where the garage was to be built.[4] The Defendant testified that the Plaintiff failed to give him advance notice that Dave would be excavating the perimeter of the garage. According to the Defendant, he had no objection to Dave performing the excavation, provided he was present to supervise the excavation work. Defendant testified that the Plaintiff called him at approximately 11:00 am on the date that Dave was

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[2] On his direct case, the Defendant confirmed that the parties did agree to a reduced down payment amount of $5,000.00 upon execution of the Contract.

[3] It is not clear to the Court why the Defendant staked out the perimeter of the garage since the Contract states that "Owner shall at Owner's expense, provide a survey of the subject Premises and have the foundation…located and staked by the surveyor prior to the commencement of construction." (Def's Exh. "A" ¶3 Survey, p. 2). According to Plaintiff's husband, Dave Odell, land surveyor, staked out the property boundary lines as per the Contract. Id.

[4] According to Plaintiff, Dave is a professional excavator who is certified and insured. However, the Plaintiff did not produce Dave as a witness nor was any evidence produced supporting Plaintiff's assertions about Dave. Notwithstanding, Defendant testified that he had no objection to Dave performing the excavation work provided has was present to supervise the excavation.

performing the excavation, but that Dave had started excavating the subject area at 8:00 am. According to Plaintiff's husband, he attempted to call Defendant at 11:00 am but could not reach him. When the Defendant arrived at the premises, he claims that Dave had already excavated three quarters (3/4) of the perimeter area.

Defendant claims that Dave negligently dug past the stake lines and deeper than 42" or 3 ½ feet deep as set forth in the Contract (Def's Exh. "A" Exhibit C: Additional Construction Details, p. 5). Specifically, Defendant claims that Dave dug the trench in some areas of the perimeter deeper than 5 feet. Defendant claims that Dave was only supposed to excavate to the frost line and that his failure to do so required the Defendant to hire another excavator in order to remediate Dave's work. The parties disputed with each other as to whether another excavator would be needed to remediate Dave's work.

According to Plaintiff's husband, the Defendant negligently staked out the perimeter of the garage by using a ruler to plot the stake lines around the four corners of the garage.

At some point thereafter, the trench started to fill with water perhaps, according to Plaintiff, due to an underground spring. In any event, the Defendant attempted to drain the trench with a small pump that, according to him, was working slowly due to the fact that the Plaintiff was cutting off power to it at night. According to the Defendant,

since the property was basically level, he wanted to drain the trench by directing water to the front of the property by digging a hole in the wall of the trench and using a water line or hose to drain the water to the front of the property. Plaintiff, according to Defendant, opposed this method of draining the trench.[5]

Plaintiff's husband testified that the pump that was utilized by the Defendant was insufficient due to its small size and power and due to the fact that it would often clog with mud and stop working.

On or about July 9 or 10, 2014, Plaintiff said that the Defendant informed her that he could no longer perform under the contract without explanation. According to the Plaintiff, the Defendant started the foundation work but did not complete it. According to the Defendant, he informed the Plaintiff that due to negligent work of Dave in excavating too deeply the perimeter of the garage, he had to charge more money to remedy Dave's work in order to safely build the garage.

After the parties failed to reach a resolution, the Plaintiff's husband contracted the services of A-Class Builders, Inc., on July 11, 2014 in order to complete the construction of the garage (Plt's Exh. "14").

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[5] The Defendant introduced an email from his expert, Architect John Lentini, to the Town of Kent Building Dept. wherein the expert states that he visited the site to analyze the ground water problem and recommended that the trench water be drained via a sump hole, that he did not believe that the area could be made water-free due to adjoining swamp land, and that the land conditions required a modification of the load bearing estimates for the proposed garage. Mr. Lentini was never called as a witness in this case and the Court does not consider his email to the building department an expert report in any regard. Nor did the Defendant state or produce any

According to Plaintiff, the cost of constructing the garage was $48,000.00. Plaintiff claims that A-Class Builders had to drain the trench and refill it in order to complete the construction of the garage, which it eventually did (Plt's Exhs. "5" and "13"). Further, Plaintiff claims that the property had to be re-surveyed because Defendant negligently staked out the perimeter lines for the garage.[6]

In two checks dated July 10 and 21, 2014, the Defendant returned $3500.00 to the Plaintiff.[7] (Def's Exh. "D"). On January 2, 2015, Plaintiff's attorneys sent a letter to the Defendant demanding the return of her $5,000.00 deposit and the $4,000.00 increased difference between their Contract and the Plaintiff's contract with A-Class Builders, Inc. (Plt's Exhs. "15" and "16").[8] After Defendant's refusal and/or failure to reimburse the Plaintiff according to her demand letter, the Plaintiff commenced this action seeking damages in the amount of $5,000.00 for breach of contract.

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evidence that this email was given to the Plaintiff.

[6] The Plaintiff did not produce a witness from A-Class Builders to testify in this case on her behalf.

[7] Defendant reimbursed the Plaintiff with two checks—Chk. # 1195 in the sum of $1,000 and Chk. # 1197 in the sum of $2,500.00, for a total sum of $3,500.00.

[8] When asked by the Court why Plaintiff was demanding $5,000.00 in damages, the Plaintiff acknowledged receipt of $3,500.00 of the $5,000.00 deposit but she was suing for the remaining $1,500.00 balance and the $4,000.00 difference in contract price she had to pay when she contracted with A-Class Builders, Inc. for a total sum of $5500.00. Plaintiff stated that she reduced her claim to $5,000.00 to come within the Court's Small Claims monetary jurisdictional limit. See, UCCA §1801.

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Discussion

It has been held that the Small Claims Part of a City Court is commanded to "do substantial justice between the parties according to the rules of substantive law." Williams v Roper, 269 A.D.2d 125, 126, 703 N.Y.S.2d 77, 79 (1st Dept 2000); UCCA §1804; see also, Milsner v. McGahon, 20 Misc.3d 127(A), 2008 WL 2522307 (App. Term. 9th & 10th Judicial Districts); Basler v. M&S Masonry & Construction, Inc., 21 Misc.3d 137(A), 2008 WL 4916105 (App. Term, 9th & 10th Judicial Districts). This is especially so since the practice, procedures and forms utilized in the Small Claims Part were meant to "constitute a simple, informal and inexpensive procedure for the prompt determination of such claims in accordance with the rules and principles of substantive law." UCCA §1802. Further, the Court "shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence...." UCCA §1804.

At a bench trial, the Court is empowered to make credibility determinations regarding the testimony of the parties and the evidence proffered by them. L'Esprance v. L'Esprance, 243 AD2d 446, 663 NYS2d 95 (2d Dept. 1997). The reason for this is that the trial court sitting as the trier of fact had the opportunity to hear and observe the demeanor of the witnesses while they were testifying as well as to weigh the evidence proffered by them. Keller v. Halsey, 202 NY 588, 95 N.E.

634 (1911); Ahr v. Karolewski, 48 AD3d 719, 853 NYS2d 172 (2d Dept. 2008); Mazzariello v Davin, 252 AD2d 884, 676 NYS2d 354 (3d Dept. 1998); QPII-35-12 99th Street, LLC v. Batista, 33 Misc.3d 25, 932 N.Y.S.2d 301 (Sup. Ct. App. Term 2d Dept., 2011). Here, although the Court finds that the testimony of the Plaintiff was credible, she failed to satisfy her burden of proving her case by a fair preponderance of the evidence. Kennealy v. Westchester Electric Ry. Co., 86 AD 293, 83 NYS 823 (2d Dept. 1903), *aff'd,* 181 NY 582, 74 NE 1119 (1905); Roth v. Hanover Ins. Co., 126 Misc.2d 347, 482 NYS2d 687 (Suffolk County Dist. Ct., 1984).

In order for a plaintiff to recover for breach of contract, the plaintiff must prove the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach. See, Dee v. Rakower, 112 A.D.3d 204 (2d Dept. 2013), citing Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc., 84 AD3d 122, 127 [2011]; Brualdi v IBERIA, Lineas Aereas de España, S.A., 79 AD3d 959, 960 [2010]; JP Morgan Chase v J.H. Elec. of N.Y., Inc., 69 AD3d 802, 803 [2010]; Furia v Furia,116 AD2d 694, 695 [1986]

Applying the aforementioned principles, there is no dispute that the parties entered into a Contract (Plt's Exh. "1"; Def's Exh. "A"). However, the Court finds that the Plaintiff failed to perform her

contractual obligations under the Contract by engaging the services of her neighbor Dave to perform excavating work without permitting the Defendant the opportunity to supervise the work as agreed to by the parties. In fact, the Plaintiff never disputed the Defendant's assertion that the parties agreed that Dave could perform the excavation work on condition that the Defendant be present to supervise the work.

The Plaintiff breached the Contract when she allowed Dave to begin excavating the perimeter of the foundation at least three hours before the Defendant was notified that Dave was doing so. Paragraph 11 of the Contract clearly stated that "Owner agrees not to make any arrangements with any other party…to improve the Premises or any of the structures thereon without the express written consent of the General Contractor" (Plt's Exh. "1" ¶11 and Def's Exh. "A" ¶11). Although the Defendant orally agreed to Dave performing the excavation work on condition that he be present to supervise the work, the Plaintiff's failure to notify the Defendant until three hours after the excavation work had commenced violated Paragraph 11 of the Contract.

Further, it appears that Dave did not perform the excavation work in conformity with the Contract, in that he excavated a foot or more beyond the 42" or 3 ½ feet depth that the Contract specified (Plt's Exhs. "2", "4", "8", "10", and "11"; Def's Exh. "A" Exhibit C: Additional Construction Details, p. 5). Of critical importance is the fact that

Plaintiff did not call either Dave or a knowledgeable employee from A-Class Builders to rebut the Defendant's claim that Dave was negligent in excavating the trench too deeply and too wide, which would have required the Defendant to enlist the services of another excavator (at an additional cost, to be sure, and to which the Plaintiff objected) in order to remedy Dave's work before completing construction of the garage in accordance with contractual specifications. In fact, Defendant claimed that because Dave negligently dug the trench too wide and too deep he could no longer safely build the garage to the specifications set forth in the Contract. Plaintiff wholly failed to rebut that assertion.

Under the Contract between the parties, the Defendant warranted that "the construction will be performed in conformity (i) with the Contract Documents…[and] (iv) in a good and workmanlike manner…." (Def's Exh. "A" ¶10 Contractors Warranties, p. 3). By refusing to build the garage pursuant to the original contractual specifications after Dave negligently dug the trench too wide and too deeply rendering further construction unsafe, the Defendant was fulfilling his contractual obligation as General Contractor to ensure that "the construction will be performed in conformity (i) with the Contract Documents…[and] (iv) in a good and workmanlike manner…." Id. The fact that the Plaintiff failed to notify the Defendant until three hours after the excavation work had

begun is less important and not dispositive, than the fact that the Court believes that Dave negligently excavated the perimeter of the foundation, after being hired by Plaintiff to perform the work, thereby preventing Defendant from performing his contractual obligation in conformity with the contractual specifications and costs.

It is well settled that there is an implied condition in every contract that one party will not prevent performance by the other party. See, Industry Associates, LLC v. Trim Corp. of America, 297 A.D.2d 630 (2d Dept. 2002); Rooney v. Slomowitz, 11 A.D.3d 864 (3d Dept. 2004); Syracuse Orthopedic Specialists, P.C. v. Hootnick, 42 A.D.3d 890 (4th Dept. 2007). Where, as in the case at bar, one party's conduct frustrates and prevents performance by the other party, the other party is excused from performance under the contract. See, Conservancy Holdings, Ltd. v. Perma-Treat Corp., 126 A.D.2d 114, (3d Dept. 1987); Brenner v. Schreck, 17 Misc2d 945 (App. Term, 2d Dept. 1959). Hence, the Court finds that the actions of Plaintiff frustrated and prevented the Defendant's performance under the Contract, thereby excusing the Defendant from any further contractual obligation to perform.

Further, since an element of the Plaintiff's cause of action for breach of contract is that she prove that she performed pursuant to the Contract, her failure to prove that she performed in conformity with the

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Contract is fatal to her cause of action for breach of contract. See, Dee v. Rakower, *supra.* Accordingly, the Defendant is entitled to a judgment in his favor.

Based on the testimony and evidence presented at the hearing in this matter, this Court, in the interests of substantial justice in accordance with the rules and principles of substantive law, finds in favor of the Defendant.

Ordered, that the Defendant is entitled to a judgment dismissing the Plaintiff's cause of action for breach of contract.

This constitutes the decision and order of the Court.

Hon. Reginald J. Johnson
City Court Judge

Dated: Peekskill, NY
July 27, 2015

Judgment entered in accordance with the foregoing on this ____ day of July, 2015.

Concetta Cardinale
Chief Clerk

To: Nancy Hutchinson
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Carmel, New York 10512

Ralph Frissora
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