V.C. Vitanza Sons, Inc. v Liberty Mut. Ins. Co.
2016 NY Slip Op 31616(U)
August 24, 2016
Supreme Court, New York County
Docket Number: 650307/2015
Judge: Ellen M. Coin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

----------X

V.C. Vitanza Sons, Inc.,

Plaintiff,

- against -

Liberty Mutual Insurance Company,

Defendant.

----------X

Index No.: 650307/2015
Motion Date: April 13, 2016
Motion Seq. No.: 001

DECISION AND ORDER

For Plaintiff:
Fox & Kowalewski, LLP
Brendan R. Wolf, Esq. & Laurence Irvin Fox, Esq.
Four Old Route 146, P.O. Box 958
Clifton Park, NY 12065
(518) 383-0200

For Defendant:
Harold M. Pressberg, Esq. & Harold John Gabriel, Esq.
21 Anderson Lane
Goldens Bridge, NY 10526
(914) 232-7531

The following papers were read on this motion for partial summary judgment:

Ellen M. Coin, J.:

Plaintiff V.C. Vitanza Sons, Inc. (VCVS) moves pursuant to CPLR 3212 for partial summary judgment on liability against defendant surety Liberty Mutual Insurance Company (Liberty Mutual) on plaintiff's claim for breach of a labor and material payment bond.

Andron Construction Corp. (Andron) was hired in June 2009 by the New York City School Construction Authority (SCA) as the general contractor on a construction project known as the "New Six (6) Story School at Community Health Academy (Manhattan)" (Verified Complaint [Compl.] at ¶5). Defendant Liberty Mutual issued a labor and material payment bond (Bond No. 015029124) in accordance with section 137 of the New York State Finance Law for the benefit of the laborers, materialmen, suppliers and subcontractors providing labor,

equipment and materials for the project.

By contract dated July 24, 2009, plaintiff agreed with Andron to perform the plumbing work on the project for a price of $2,273,500.00 (Affidavit of Louis L. Vitanza in support of motion, sworn to Nov. 3, 2015 [Vitanza Aff.], Ex. B, Bates No. 001). Plaintiff avers that it duly performed and completed all work required by the contract (Compl. ¶12). Plaintiff also states that it completed certain extra and additional work totaling $341,787.78 that Andron requested and approved pursuant to written change orders (*id.* ¶26 and Ex. C at 42). The complaint alleges that Andron owes VCVS $272,792.47 for work completed under the original contract ($175,974.00) and work pursuant to written change orders ($96,818.47) (Compl. ¶¶23, 30). (Affidavit of Brendan Wolf, sworn to Nov. 5, 2015 [Wolf Aff.], Ex. A).[1] Plaintiff alleges that defendant is obligated to pay this sum under the terms of the labor and materials bond (*id.* ¶21).

Liberty Mutual admits that it furnished the bond to Andron, that Andron and plaintiff entered into a written subcontract, and that plaintiff performed work on the project, including certain extra work for which the SCA has "paid Andron in part" (Liberty Mutual Answer at ¶5-9). However, Liberty Mutual claims that no money is due and owing to plaintiff, raising as affirmative defenses that Andron has not received payment from the SCA for the amounts claimed by plaintiff and that plaintiff's work on the project was not approved and accepted in its entirety by the SCA (*id.* ¶11-13).

Plaintiff's Secretary/Treasurer Louis L. Vitanza avers that "[p]laintiff duly completed all work required" and that VCVS "has not received payment for any portion of" its final invoices, which are numbered 26-31 (Vitanza Aff. at ¶¶9-10). Plaintiff does not allege any balance due on

[1] Andron's calculations differ, as do the sums that the Court has calculated from the record. These discrepancies are discussed below.

prior invoices (*id.*). The combined balance due for Invoices 26-31 totals $198,806.17, or $277,170.19 when the retainage listed on Invoice 31 is included (*id.* at Ex. C).

As proof that the SCA has paid Andron in full, plaintiff refers to Andron's 44 payment applications to the SCA and a list showing the SCA's payments on each of these applications (the Deposit Detail) (*see* Wolf Aff. at Ex. D & E). Plaintiff alleges that by cross-referencing these two exhibits, it is apparent that Andron received full payment from the SCA for each of the 44 payment applications it submitted.[2] Vitanza further avers that all of plaintiff's work was included in these payment applications, and that at no time while plaintiff was working on the project did Andron or anyone else provide notice "that Plaintiff's performance on the project was less than acceptable" (*id.* at ¶21-22).

In opposition to plaintiff's motion, Liberty Mutual submits an affidavit from Charles F. Winter (Winter), Andron's president. Winter contends that Andron has no obligation to pay plaintiff until the SCA pays Andron (Affidavit of Charles F. Winter, sworn to Jan. 14, 2016 [Winter Aff.], ¶1). Further, he attests that payment from the SCA to Andron depends on the outcome of ongoing, contractually-mandated alternative dispute resolution proceedings (*id.*). According to Winter, the SCA is withholding $1,441,073.76 in retainage as well as the $978,710.34 for the remaining prime contract balance (*id.* at ¶5). Winter also avers that according to application No. 44, Andron has not been paid for three items of plaintiff's original work (Item No. 02280 [Plumbing Closeout - $25,000], Item No. 02350 [Vacuum & Air Piping - $250], and Item No. 02600 [Tags, Charts and Identification - $750]), totaling $26,000 (*id.* ¶6 and

[2] The record appears to show only partial payment for the invoices numbered 40 and 42 (*id.* Ex. D; *id.* Ex. E, Bates No. 1178 and 1242). On invoice number 44, not all items are listed as 100% complete and paid (*id.* Ex. E, Bates No. 1276-1308).

Ex. B).[3] Winter alleges that the SCA is withholding payment for the plumbing closeout line item because plaintiff has failed and/or refused to complete 35 closeout tasks (*id.* ¶10 and Ex. D). Winter further attests that Andron "has not received payment of $36,878.21 on account of plaintiff's approved change orders" (*id.* ¶7). Winter concludes that Andron has not received payment from the SCA for plaintiff's work in the sum of $137,977.23 by adding the following three categories:

Unpaid original subcontract price:	$22,735.00[4]
Unpaid approved change orders	$36,878.21
Unpaid retainage	$78,364.02

(*id.* ¶9).

Winter also avers that plaintiff owes Andron $100,973.57 in back charges for work that plaintiff failed to perform, for damage plaintiff caused to other contractors' work, and for the renewal of plaintiff's plumbing permit (*id.* ¶21, Ex. F). Citing Paragraph 21 of the subcontract, Winter contends that Andron is entitled to withhold this amount until issues of fact are resolved as to "[t]he entitlement and amount of these back charge items," the largest of which is $33,220.48 for "Chopping Around Drains For Waterproofing" (*id.* ¶21 and Ex. F).

Winter claims that the SCA has refused to process any payment applications from Andron after application No. 44 on account of project delays and has threatened to issue a credit change order of at least $1.1 million for its liquidated damages and emergency contractor costs (*id.* ¶¶ 5 and 14).

---

[3] Although this document only shows that Andron has not billed for these amounts, Winter contends that these payment applications are actually prepared by SCA, not Andron (*see* Winter Aff. ¶10).

[4] Winter derives this figure from the $26,000 of Vitanza's work not paid for by the SCA through comparison to the contract price, but does not clearly explain why this recalculation is proper.

The project was scheduled for substantial completion on December 21, 2012, but did not reach that stage until June 13, 2013 (*id.* ¶14). In February 2014, Andron submitted to the SCA a written request for an extension of time, citing Superstorm Sandy and the numerous notices of direction (NODs) that the SCA gave Andron as the two major factors for the delay (id., Ex. E). In its request, Andron identified eight main categories of NODs that caused the delay (*id.*). Winter avers that those eight categories involve the work of five subcontractors, including plaintiff, and that:

> Andron has taken the position that all delays to the work of these five subcontractors were excusable; however, if the dispute resolution process with SCA results in a finding that Vitanza was not timely in its performance, and that the result was a delay to the critical path of the Project, then Vitanza would be responsible for at least a portion of the costs associated with the overall Project delay

(*id.* at ¶16). Winter contends that "Andron has a substantial potential claim against Vitanza for its share of the liquidated damage and emergency contractor costs which may be upheld against Andron" until the dispute resolution process with the SCA concludes (*id.* ¶11). This share could equal Vitanza's 30% portion of the base contract value (*id.* ¶17). As a result, Andron has withheld funds otherwise due and owing to plaintiff until the dispute with the SCA is resolved.

DISCUSSION

When deciding a motion for summary judgment, a court must draw all reasonable inferences in favor of the nonmoving party and deny the motion if there is any genuine issue of material fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). Liberty Mutual's obligations to plaintiff under the bond are no greater than Andron's obligations

under the subcontract. Thus, Liberty Mutual has no obligation to pay plaintiff if Andron has a legal justification for withholding payment pursuant to the terms of the subcontract (*see Franco Belli Plumbing & Heating & Sons, Inc. v Citnalta Constr.*, 126 AD3d 492, 494-495 [1st Dept 2015]).

"Pay-if-Paid" Provision

Liberty Mutual argues that the SCA has not fully paid Andron for plaintiff's work and therefore that Liberty Mutual is entitled to withhold payment pursuant to Section 15.03 of the prime contract (Defendant's Answer, Second Affirmative Defense, at 3). The subcontract between plaintiff and Andron incorporates Section 15.03 by reference:

> Contractor shall make prompt payment to the electrical, plumbing, and gas fitting, and HVAC Subcontractors. *Within seven (7) calendar days of the receipt of any payment from the SCA*, the Contractor shall pay to each such Subcontractor that portion of the proceeds of such payment representing the value of the Work performed by each such Subcontractor, *based upon the actual value of the Subcontract which has been approved and paid for by the SCA*, less an amount necessary to satisfy any claims, liens, or judgments against such Subcontractor, which have not been suitably discharged and less any amount retained by the Contractor as provided herein. The Subcontract may provide that the Contractor retain not more than five percent (5%) of each payment to such Subcontractor ...

(Vitanza Aff., Ex. B, Bates No. 0039 [emphasis added]). This provision tracks the language of General Municipal Law § 106-b (2) regarding the payment of subcontractors on public work projects. Paragraph 5 of the Payment Annex to the subcontract contains a separate provision stating that "[p]ayment terms will be approximately 35 calendar days from the last day of the monthly period, provided payment has been made by the Owner" (Vitanza Aff., Ex. B, Bates No. 0022).

Plaintiff contends that even if Andron has not been fully paid by the SCA, a provision in a construction subcontract providing that the subcontractor will not be paid until the prime contractor is paid by the owner is contrary to public policy (*West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148 [1995] ["Pay-if-paid" provision forcing subcontractor to assume risk that owner will fail to pay general contractor void and unenforceable as contrary to public policy as set forth in Lien Law § 34]). However:

> a pay-when-paid provision which merely fixes a time for payment does not indefinitely suspend a subcontractor's right to payment upon the failure of an owner to pay the general contractor, and does not violate public policy as stated in the Lien Law.

(*id.* at 158).

The subcontract in this case contains the following payment provision:

> ...Payments for your work are to be made in accordance with the attached Payment Annex, but only if and to the extent that we receive payment for your work from the party for whom we are doing the work, hereinafter called the Owner. *Such payment from the Owner to us shall be a condition precedent for our payment to you.* From each monthly payment due you hereunder, there shall be deducted ten percent (10%) as a reserve which shall not be paid to you until the final payment shall be due you. The final payment shall be made to you within thirty days after the completion of the work by you and the acceptance of your work by the architect and/or the Owner and only after we receive final payment from the Owner for your work. *Such payment from the Owner to us shall be a condition precedent for our payment to you...*

(Vitanza Aff., Ex. B, Bates No. 003 [emphasis added]). The language providing that "payment from the Owner to [Andron] shall be a condition precedent for [Andron's] payment to [plaintiff]" is a pay-if-paid condition using the same "condition precedent" language disapproved by the Court of Appeals in *West-Fair* (87 NY2d 148 at 155). Thus, the SCA's non-payment to Andron is not a valid defense because the pay-if-paid provisions of this subcontract are void as against

public policy.

Retainage

Plaintiff does not dispute Andron's entitlement to withhold retainage (*see* Plaintiff's Reply Mem. of Law at 7).[5] A contract provision that allows retainage to be withheld until a project is completed and accepted by the owner merely fixes the time for payment and is not an improper pay-if-paid provision (*Maines Paper & Food Serv., Inc. v Losco Group, Inc.* (36 AD3d 1047, 1048 [3d Dept 2007]). Because it is not evident from the record why Andron withheld 3% retainage rather than the 5% permitted by its subcontract with plaintiff, the larger figure is used to calculate the amount that Andron is potentially entitled to withhold. Five percent of the contract price plus extra work ($2,615,287.78) amounts to $130,764.39.

Back Charges

Andron also asserts that it was entitled to withhold funds from plaintiff based on (1) its alleged right to do so as back charges for certain aspects of plaintiff's work that were either not performed or improperly performed and (2) plaintiff's alleged share of any liquidated damages and emergency contractor costs that the SCA may impose on Andron due to the delay in project completion (Winter Aff. at ¶21-22 & Ex. F). It is unclear whether Andron has withheld under these justifications amounts in addition to the $137,977.23 discussed above. Plaintiff contends that Andron waived its right to withhold any back charges because Andron failed to provide it with written notice and an opportunity to cure as required by Section 23 of the subcontract. This section provides in pertinent part:

---

[5] Although VCVS claims that the issue of retainage "must be raised at a subsequent inquest to calculate damages" and that addressing it on this motion is premature, calculation of the amount due and owing is inextricable from a determination of Liberty Mutual's liability (Plaintiff's Reply Mem. of Law at 7).

> If the subcontractor shall at any time (1) refuse or neglect to supply a sufficient number of properly skilled workmen or sufficient materials of the proper quality, or (2) fail in any respect to prosecute the Work with the *[sic]* promptness, or (3) cause by any action or omission the stoppage or delay of or inference [sic] with the Work of the contractor or of any other subcontractors, or (4) fail in the performance of any of the covenants herein contained, . . . then after serving a three days' written notice, mailed or delivered to the last known address of the subcontractor, of the existence of any of the foregoing causes, and unless the cause specified in such notice shall have been eliminated within such three days, the contractor at his option may provide either himself or through others, any such labor or materials to prosecute the work and may deduct the cost thereof from any money then due or thereafter to become due to the subcontractor under this agreement

(Vitanza Aff., Ex. B, Bates No. 0019). Liberty Mutual, in contrast, relies on Section 21 of the subcontract, which does not contain a notice requirement and which provides:

> If at any time the subcontractor shall refuse or neglect to prosecute the work in the opinion of the contractor, to insure its completion within the time frame specified in the subcontract, or to furnish labor or materials needed for this purpose, the contractor may, without voiding this contract, direct the employment of such additional labor and purchase of such materials as it may deem necessary to perform the work and pay all persons so employed and material furnished and charge the amount paid to the subcontractor without prejudice to any rights the contractor may have against the subcontractor for breach of this contract

(*id.*). Section 21 is inapplicable here because it applies to a subcontractor's total failure to perform work. This leaves Section 23 as the only offered basis for back charges, nonwithstanding any lack of mention in it of defective workmanship as its predicate. Section 23 is more relevant to Liberty Mutual's claim of offset due to delay damages. Section 7 of the subcontract specifically addresses back charges for defective work, but its two separate written notice requirements amount to the same three days' prior written notice requirement contained in Section 23.

Vitanza claims that at no time while plaintiff was performing its work did plaintiff receive notice that its performance on the project was anything less than acceptable (Vitanza Aff. ¶¶22-23). Liberty Mutual offers documentary evidence challenging this statement (Winter Aff. ¶21 and Ex. F). In July and August 2012, Andron and plaintiff exchanged emails regarding who was responsible for waterproofing bathroom floor drains, a task relating to the largest back charge (*id.* at Ex. F). Defendant also presents documents related to the renewal of plaintiff's plumbing permit, which the subcontract required it to maintain (Vitanza Aff. Ex. B, Bates No. 0019; Winter Aff. Ex. F). Therefore, defendant has shown possible entitlement to these two charges, which total $34,870.48.

Defendant has not shown entitlement to other back charges listed in Exhibit F to the Winter Affidavit. One email notifies plaintiff of "miscellaneous...patching" that Andron will complete and states that "the costs of this work will be divided" between plaintiff and multiple other contractors, but does not give plaintiff the option to do the work itself (*id.*). All other email records presented in that exhibit only show discussions among Andron employees or among Andron employees and subcontractors other than plaintiff. Similarly, labor and materials invoices contained in that exhibit are irrelevant to the issue of whether plaintiff received notice of back charges based on those invoices. Because these examples do not constitute prior written notice, they do not create an issue of fact as to the other back charges cited in Exhibit F to the Winter Affidavit.

Delay Damages

There is little evidence that plaintiff was told that it was inadequately staffing the project or otherwise causing unacceptable work delays.[6] Indeed, it is Andron's position in its alternative dispute resolution proceeding with the SCA that any alleged delays on the part of plaintiff were excusable (Winter Aff. ¶¶ 11, 16). There is no evidence in the record of any existing "claims, liens or judgments" against plaintiff for construction delays that would justify withholding disbursements required by Section 15.03 (A) of the prime contract or General Municipal Law § 106-b (2) (Vitanza Aff., Ex. B, Bates No. 0039). "[A]n unrealized, admittedly 'potential' claim for liquidated damages that the SCA may or may not assert against the general contractor does not constitute a claim for liquidated damages against [a subcontractor] by which [the surety] or the general contractor may offset its payment to [the subcontractor]" (*ACS Sys. Assoc., Inc. v Safeco Ins. Co. of Am.*, 134 AD3d 413, 414 [1st Dept 2015]).

Calculation of Current Balance Due

Currently, Andron is entitled to withhold the sum of retainage and back charges over which there is a triable issue of material fact. As stated above, the amount of retainage Andron may withhold is $130,764.39. The sum of the two back charges with supporting documentation ($33,220.48 for waterproofing drains and $1,650.00 for renewing plumbing permits) is $34,870.48. The amounts of the retainage plus back charges total $165,634.87. Any withheld funds over and above this amount are due and owing to plaintiff, and defendant Liberty Mutual is obligated under the bond to pay them.

---

[6] When a pressure test failure "flooded the basement," an Andron employee emailed a Vitanza employee about the cleanup, expressing disapproval that "it was only [Andron's] laborer working on it" (Winter Aff. at Ex. F). Andron has presented no evidence that it observed, or notified VCVS of, other staffing problems.

VCVS is not entitled to recover more than the $272,792.47 it claims in its complaint. Therefore, the $277,170.19 potential claim apparent from the invoices submitted as an exhibit to the Vitanza affidavit must be limited to $272,792.47. Subtracting from it the amount of $165,634.89 results in a difference of $107,157.58, which Andron is not entitled to withhold. Further, plaintiff is entitled to interest "from the [February 4, 2015] date when demand for payment was made pursuant to the labor and material payment bond" (State Finance Law § 137 [4] [c]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is granted to the extent of directing the Clerk to enter judgment in favor of plaintiff V.C. Vitanza Sons, Inc. and against defendant Liberty Mutual Insurance Company in the amount of $107,157.58, with interest calculated at the standard rate of 9% per annum from February 4, 2015, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action is severed and shall continue.

This constitutes the decision and order of the Court.

DATED: August 24, 2016

ENTER:

Ellen M. Coin, A.J.S.C.