Elegant Granite & Marble v J Suss Indus. Inc.
2018 NY Slip Op 31111(U)
May 30, 2018
Supreme Court, New York County
Docket Number: 655268/2016
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Part 57

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ELEGANT GRANITE & MARBLE

Plaintiff(s) **Index no. 655268/2016**

-against-

DECISION/ORDER

J SUSS INDUSTRIES INC. & HAMPTON INN

Defendant(s)

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion for summary judgment and cross motion for partial summary judgment

PAPERS	NUMBERED
Notice of Motion and Affidavits and Exhibits Annexed	1
Notice of Cross-Motion and Affidavits and Exhibits Annexed	2
Answering Affidavits and Exhibits Annexed	3 & 4

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Andrew Borrok, J.

Elegant Granite & Marble, a New Jersey corporation (the **Plaintiff**) is engaged in the supply and installation of granite, marble and other stone. Hampton Inn contracted with J. Suss industries Inc. (the **Defendant**) for the renovation of its hotel located at 220 West 41st Street, New York, New York (the **Premises**). During the period commencing November, 2014 and ending June, 2015, the Plaintiff supplied and installed granite, artificial marble and quartz at the Premises pursuant to certain purchase orders with the Defendant. In October, 2016, Plaintiff sued Hampton Inn and the Defendant to recover for certain alleged

unpaid monies owed for supply and labor provided and performed by the Plaintiff at the Premises pursuant to purchase orders #19906, #22549, #22692 and #21194 in the sum of $65,564.32 which the Plaintiff alleges remains due and outstanding.

The Defendant claims (i) that Purchase Order #21194 included a charge of $22,450 for supplying and installing window sills with notch cutting at the Premises and that the Plaintiff's Invoice # 02404 for $24,227 is really for the $22,450 which is included in Purchase Order #21194 and certain replacement costs for materials that were allegedly stolen from the site for which the Defendant argues it is not responsible and (ii) that the amounts which remain unpaid are otherwise retainage which the Defendant will tender if the Plaintiff were to discontinue this lawsuit.

On October 31, 2016, the Defendant brought a Motion to Dismiss pursuant to CPLR § 3211 arguing that the Plaintiff as a foreign corporation doing business in New York did not have capacity to sue. On December 21, 2016, New York State Supreme Court Justice Cynthia Kern denied the Defendant's Motion to Dismiss.

On March 23, 2018, pursuant to a certain Stipulation of Partial Discontinuance, the action was discontinued with prejudice as against Hampton Inn.

On January 10, 2018, the Defendant moved pursuant to CPLR § 3212 for summary judgment. The Plaintiff cross moved for partial summary for $41,337.32 arguing that the Defendant does not dispute that the amount of $42,337.32 is the amount of the retainage which is due and further argues that the $24,227 amounts to certain corner notching work which was not contemplated by Purchase Order #21194 and which was authorized and accepted by the Defendant. In support of its contention, the Plaintiff attaches a series of emails to its cross-motion, one of which, dated May 2, 2015, from Danielle Lewis indicates that without GC signoff, the responsibility "is with you"[1] and another of which, dated August 11, 2015, from Kenny Suss to Shishir Agarwal asks for a breakdown of the "$24k charge".[2] Specifically, Mr. Suss queries "how much is for the 54 sills and how much is for stolen material." However, nowhere in those emails does the Defendant indicate

[1] This email responds to an email from Shishir Agarwal, the corporate officer and authorized representative of Plaintiff.

[2] Indeed, subsequent to the email from Mr. Suss, by email, dated August 13, 2015 (the **August 13th Email**), Mr. Agarwal sent photos showing the size of pieces that had to be cut and that it was "not contemplated" as the notches were not made because the corners got damaged.

that the $24k charge is not included as part of Purchase Order # 21194 or in a subsequent email to Mr. Agarwal's August 13th Email otherwise admit responsibility for any portion of the $24k charge or acknowledge that it is not contemplated by Purchase Order # 21194.

In the Defendant's Reply Affirmation in Support of its Motion for Summary Judgment and Opposition to Plaintiff's cross motion, the Defendant (i) disputes the amount of the retainage to be $41,337.32 because of a backcharge in the amount of $7,388.32 for supplemental labor to finish Plaintiff's scope of work and (ii) asked (for the first time in its Reply) that the Court award Rule 130-1.1 (c) sanctions because the Defendant argues that the assertion by Defendant that the additional costs for the corner windows which needed additional materials and labor was not in the purchase order is materially false.

At issue is whether the amounts claimed to be due by Plaintiff as additional work were either authorized as separate work or included in Purchase Order # 21194. Inasmuch we find that there are material issues of fact, the Defendant's motion for summary judgment and the Plaintiff's cross motion for partial summary judgment and Rule 130-1.1(c) sanctions are denied.

Summary Judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit. CPLR § 3212(b). The burden is initially on the movant to make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. Failure to make such a primary facie showing requires denial of the motion. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] *citing Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]. Once the showing has been made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact which requires a trial. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, at 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980].

As discussed above, inasmuch as there exists a material issue of fact as to whether the additional $24,227 was included in Purchase Order # 21194 and whether the $41,337.32 is the retainage amount due Plaintiff, the Defendant's motion for summary judgment and the Plaintiff's cross-motion for partial summary judgment and Rule 130-1(c) sanctions are denied.

Dated: May 30, 2018

Hon. Andrew Borrok
Justice of the Supreme Court

Hon. Andrew Borrok