H2 Consulting P.E., P.C. v 38 Delancey Realty, LLC
2018 NY Slip Op 32371(U)
September 24, 2018
Supreme Court, New York County
Docket Number: 113263/2011
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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H2 CONSULTING P.E., P.C., HARRY HONG,

Plaintiffs,

- v -

38 DELANCEY REALTY, LLC, 38 DELANCEY LLC, YANG TZE RIVER REALTY CORP., U.S. SPECIALITY INSURANCE COMPANY,

Defendants.

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INDEX NO. 113263/2011

MOTION DATE 10/16/2017

MOTION SEQ. NO. 002

DECISION AND ORDER

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106 were read on this motion to/for JUDGMENT - SUMMARY

This action arises from two agreements pertaining to a property located at 38 Delancey Street in New York County (Property). In January 2002, an architectural agreement (Design Contract) was executed by plaintiff Harry Hong, a professional engineer, and defendant Yang Tze River Realty Corp. (Owner), the Property's owner. Under the Design Contract, Hong was engaged to provide architectural services for Owner's project to renovate the Property into a multiple-story mixed-use building (Project). After certain foundation-related services were performed by other general contractors, Hong's construction company, plaintiff H2 Consulting P.E., P.C. (H2), was engaged as the Project's general contractor by an agreement entered by H2 and Owner in February 2007 (Construction Contract). H2 served in that capacity until August 2010.

According to plaintiffs' complaint,[1] dated November 22, 2011, plaintiffs performed all obligations under the Construction Contract, but defendants failed to remit full payment for those services. The complaint raises the following three claims, all related to the Construction Contract, seeking an order: (1) issuing a declaratory judgment that a mechanic's lien filed by plaintiffs against the Property for $3,846,728.84—the amount plaintiffs assert they are owed under the Construction Contract—is valid; (2) finding that Owner breached the Construction Contract by violating its obligation to compensate plaintiffs for labor and materials for the Project, and entering judgment in plaintiffs' favor for the allegedly unpaid $3,846,728.84; and (3) directing that plaintiffs may recover the $3,846,728.84 from the bond issued by defendant U.S. Specialty Insurance Company as an undertaking in connection with plaintiffs' lien. The complaint does not mention the Design Contract or allege that there are unpaid sums owed to plaintiffs under that agreement.

Defendants' answer, dated February 27, 2012, raises, among other things, various counterclaims arising from the Design and Construction Contracts, which seek an order: (1) declaring plaintiffs' mechanic's lien void as willfully exaggerated; (2) awarding Owner and other defendants damages for filing the willfully exaggerated lien; (3) awarding damages for plaintiffs' breach of the Construction Contract by abandoning the Project prior to completion and issuance of a certificate of occupancy; (4) awarding damages for plaintiffs' breach of the Construction Contract's time of the essence provision and deadline for completing the Project; (5) awarding damages for plaintiffs' negligent supervision and control of the work-site; (6) awarding damages for plaintiffs'

[1] The complaint was verified on November 21, 2011 by Hong.

breach of the Construction Contract's indemnification provisions; (7) awarding damages for plaintiffs' breach of the Design Contract in abandoning the Project without completing all obligations; and (8) awarding damages for plaintiffs' negligent performance of their obligations under the Design Contract.

The Design Contract

The Design Contract provides that Owner would pay a base fee of $440,000 for the design services contemplated by the agreement. The Design Contract also provides for calculating and charging other fees for "Additional or Optional Services" that are "authorized and confirmed in writing" (2/1/22 Design Contract, NYSCEF Doc. No. 59). Additional services include revisions to authorized or approved design work, "[r]evisions resulting from changes to the base building structure, services and core elements," "[a]ny effort or activity" that was unforeseen when the design proposal was prepared, and fees paid to third-party consultants (*see id.*). In support of this motion, Hong states that defendants requested that plaintiffs perform additional services "outside the scope of the Design Contract, including . . . submitting [Department of Buildings] applications, obtaining approval, conducting controlled inspections, and preparing engineer reports," and those services added $289,000 in extra fees. Ultimately, Hong asserts in support of this motion that $314,500 remains unpaid by defendants under the Design Contract (*see e.g.* NYSCEF Doc. No. 50).

The Construction Contract and Execution of the Project

Originally, a non-party general contractor, Sun Sun, was engaged to execute the Project using design plans generated under the Design Contract. Sun Sun performed certain excavation and foundation work on the Property in 2003-2004 before being

terminated by Owner. Sun Sun was replaced by another non-party general contractor, Capital One Construction, which provided construction services for the Project from 2005-2006. In early 2007, the Construction Contract was executed by Owner and H2, and H2 served as general contractor until August 2010. The court notes that the Construction Contract identifies Hong as the Project's "Architect," a position for which the agreement assigns various obligations.

Article 3 of the Construction Contract, entitled "Date of Commencement and Substantial Completion," provides that work shall commence on March 8, 2007, construction is to be completed 16 months after commencement, and the certificate of occupancy to be obtained within two months thereafter (Construction Contract, NYSCEF Doc. No. 56). Section 3.2 further states that H2 will have "Substantial[ly] Complet[ed]" the work contemplated by the Construction Contract within 485 days of commencement, with "Completion . . . not later than July 6, 2008 - Time is of the Essence" (*id.*). Additionally, "[i]f any Delays in completion of this project Occur, for whatever reason, [H2] shall be FULLY responsible for liquid damages in the amount of bank interest per calendar day including all holiday AND ANY COSTS OF REPAIRS/REPLACEMENT [sic]" (*id.*). H2 was to be paid $18,351,000 for performing its obligations under the agreement, which explicitly states that $18,351,000 is the "Guaranteed Maximum Price (GMP) – No Add ons and/or Extras [sic]" (*id.* § 4.1). Page 7 of the Construction Contract then further provides:

> "AS WE ALL AGREED THE MAJOR POINTS IN WRITING SHOULD BE:
>
> 1- GUARANTEED MAXIMUM PRICE (GMP)
> A – NO 'ADD-ON'S'
> B – NO 'EXTRAS'

UNLESS IN WRITING AND SIGNED BY THE BANK'S, OWNERS AND ARCHITECT.

2 – PROVIDE FULLY ACCEPTABLE: 'CERTIFICATE OF OCCUPANCY' without any qualifications or exclusions. That is definition of Completion.

. . . .

4 – ARCHITECT HAS FULL AND TOTAL RESPONSIBILITY FOR SUCCESSFUL COMPLETION OF ANY AND ALL FUNCTIONS OF THIS PROJECT UP TO AND INCLUDING THE C.O.O.

5 – CONSEQUENTIAL AND LIQUIDATED DAMAGES & INCENTIVE:
If any Delays in completion of this project, Occur . . . the GC [H2] shall be FULLY responsible for liquidated damages . . . AND ANY COSTS OF REPAIRS/REPLACEMENT.

6 – SCHEDULE: TIME IS OF THE ESSENCE. [H2] shall provide an Official Schedule, in writing . . . for the successful completion of this Project – Including the Certificate of Occupancy [sic]" (*id.* at 7).

In his affidavit in support of this motion, Hong states that the original plans and specifications for the Project were incorporated into the Construction Contract and provided for a 16-story mixed-use building with a red brick façade (NYSCEF Doc. No. 50). According to Hong, additional costs, services, and delays were incurred because the Project's foundation required "substantial remediation" and renovation not contemplated by the Construction Contract; the "unforeseen defects in the foundation and the absence of underground piping" required H2 to perform work "contrary to any and all contracted for documents, designs and/or specifications" (NYSCEF Doc. No. 50, at 9).

Additionally, Hong states that "it was clear from the outset that [defendants] intended to construct a building very different from the [original plans] . . . , resulting in extensive 'Add ons' and 'Extras' including extra labor, unforeseeable delays and

unanticipated costly upgrades [sic]," which were "clearly not within the scope of the Construction Contract or Design Contract" (*id.* at 10-17). Defendants retained a second architectural firm, Koko Architecture + Design (Koko), "immediately after H2's execution of the Construction Contract, unbeknownst to H2," and defendants and Koko requested numerous, significant alterations to the existing design plans that caused "substantial delays, . . . additional work . . . , and costly [materials] upgrades," and which rendered H2's completion of the Project within the allotted time "impossible" (*id.*).

In sum, Hong identifies 96 items of "Extra Work," "Add ons," and "Extras" that H2 performed for the Project, the monetary value H2 has assigned to each item, and the number of days each item allegedly delayed H2's completion of the Project (*see id.* at 9-17; *see also* NYSCEF Doc. No. 63). A spreadsheet with attachments, titled "Final payment to H2 summary with delay time for extra works," dated October 12, 2017, indicates a total of 1,108 days of delay and $3,379,071.96 in additional costs (after deducting credits) were incurred by plaintiffs (NYSCEF Doc. No. 63).

H2 obtained an initial temporary certificate of occupancy for the Property on June 28, 2010 (NYSCEF Doc. No. 64). The parties dispute whether H2 "walked off" the Project or whether Owner unilaterally terminated the Construction Contract; either way, H2's involvement as general contractor for the Project ended in August 2010.

Plaintiffs now move, pursuant to CPLR 3212, for an order awarding summary judgment on each of their three causes of action, and further move, pursuant to CPLR 3211 (a) (1), (6), and (7), to dismiss each of defendants' eight counterclaims.

Part I: Plaintiffs' Motion for Summary Judgment

Summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see generally* CPLR 3212). Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

1. Plaintiffs' motion as to damages arising from breach of the Design Contract

As a preliminary matter, plaintiffs' motion for summary judgment on the issue of defendants' purported failure to remit payment in the amount of $314,500 for additional services performed by plaintiffs in connection with the Design Contract is denied. No claim for breach of the Design Contract is raised in plaintiffs' complaint or response to defendants' counterclaims. Indeed, plaintiffs do not even mention the Design Contract in their complaint and have not amended or attempted to amend the complaint to reflect a claim for breach of the Design Contract. Accordingly, this prong of plaintiffs' motion for summary judgment is denied; however, plaintiffs are not precluded from using evidence related to the Design Contract in connection with their affirmative defenses to defendants' counterclaims.

2. Plaintiffs' motion for damages arising from the Construction Contract

Plaintiffs seek, in their notice of motion, an award of summary judgment in their favor on the complaint "in all respects and its entirety [sic]." Plaintiffs contend that the evidence tendered in support of the motion demonstrates that defendants breached the Construction Contract by failing to pay for the additional work, labor, materials, and delay costs that were caused by no fault of plaintiffs; rather, those additional costs resulted in large part from the many "Add ons," "Extras," and alterations to the original designs/plans that defendants requested.

Among other arguments in opposition to the motion, defendants respond that the contract unambiguously provides an explicit "Guaranteed Maximum Price" and explicitly prohibits any "Add ons" or "Extras" that are not authorized in writing by the Owner, the Bank, and the Architect. Defendants further respond that plaintiffs have not demonstrated with admissible evidence that each item for additional costs was the result of a change request made by Owner, and that each item does not constitute a general construction service that H2 was required to perform under the Construction Contract as written. Defendants also assert that the admissible evidence tendered by plaintiffs does not demonstrate that Owner and H2 waived provisions of the Construction Contract through conduct establishing indisputable mutual departure from those terms.

Plaintiffs respond that their evidence establishes indisputable mutual departure from the provisions requiring written, thrice-signed requests for add-ons and extras in that Owner's president, Mr. Yam, testified that he orally requested, and plaintiffs orally

agreed, to the alteration requests, and the parties' conduct shows that the contractual prohibition against oral modifications was waived.

"When a written contract, as here, provides that it can be modified only by a signed writing, an oral modification of that agreement is not enforceable unless the oral modification is fully executed or there has been a partial performance 'unequivocally referable' to the oral modification" (*F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80-81 [1st Dept 2000], citing GOL § 15-301 [1], *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 [1977]).

Plaintiffs' evidence does not establish that the parties agreed to an oral modification of the Construction Contract, or the Design Contract; instead, plaintiffs assert only that various provisions of the Construction Contract—for instance, those requiring written and authorized change orders, or those imposing liquidated damages for H2's failure to meet time of the essence deadlines—were waived by defendants, as evidenced by the parties' conduct in executing changes to the original plans and the parties' continued relationship after specified deadlines had passed. Plaintiffs, however, have not eliminated all triable issues of fact as to the scope or terms of any oral agreement to modify or waive any of the provisions in the Construction Contract; thus, evidence of "partial performance" cannot be "unequivocally referable" to an oral agreement here, since plaintiffs have not defined the parameters of an oral modification of the Construction Contract.

Accordingly, there are triable issues of fact as to whether an oral modification was made, what was the scope and substance of such modification of the Construction Contract, and, thus, whether the parties' conduct is "unequivocally referable" to such

modification. While the evidence clearly points to some form of oral modification of the Construction Contract—or, indeed, abandonment of aspects of the agreement by both parties—the court is compelled to find that there are issues of fact regarding the extent and/or terms of the modifications to which the parties agreed. Mere reliance on purported waivers of explicit, strict contract provisions precluding additional work, imposing penalties for delays, and capping the contractor's maximum payment for the Project is simply not reasonable where plaintiffs, sophisticated contractors and engineers, would incur millions of dollars in additional work costs and potential liquidated damages (*see F. Garofalo Elec. Co.*, 270 AD2d at 81).

Additionally, "[u]nder New York law, oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorization or notice of claims" (*Barsotti's, Inc. v Consol. Edison Co. of New York, Inc.*, 254 AD2d 211, 212 [1st Dept 1998]). Addressing a challenged non-jury verdict in a construction case, the Third Department stated that a provision mandating written change orders may be deemed waived where "the conduct of the parties demonstrates an indisputable mutual departure from the written agreement and the changes were clearly requested" by the party that contracted for the work to be performed (*Austin v Barber*, 227 AD2d 826, 828 [3d Dept 1996]).

In spite of plaintiffs' evidence—including documents, testimony, and affidavits—supporting their claims of unpaid fees for services, labor, and materials, as well as costs related to Project delays—the court must again find that they have not eliminated all triable issues of fact. While some of plaintiffs' evidence demonstrates that certain delays, changes, and costs resulted from Owner's verbal/informal requests to alter the

Project, the evidence—much of which consists of plaintiffs' self-serving statements, and documents generated by plaintiffs just days before this motion was filed (*see e.g.* NYSCEF Doc. Nos. 50, 63 [10/16/18 Hong aff and 10/12/17 spreadsheet accounting for "additional costs"])—does not eliminate issues of fact as to whether the parties waived various provisions of the Construction Contract. For instance, triable issues of fact remain as to whether the parties, through statements or course of conduct, indisputably and mutually waived the unambiguous, explicit terms of the Construction Contract requiring written notice and authorization for all "add-ons" and "extras." Despite some evidence showing that Owner communicated verbal change requests for some Project alterations, plaintiffs' evidence does not conclusively demonstrate that each of the 96 itemized additional costs resulted from a request by Owner, as opposed to work necessary to complete the Project under the Construction Contract.

Issues of fact also remain as to the fees plaintiffs claim arose from construction delays, additional labor, upgraded materials, and other services prompted by causes other than Owner's change requests; for instance, the additional services and remediation plaintiffs allegedly performed on the Project's foundation. Triable issues of fact also exist as to whether the parties waived or modified the payment procedures in the Construction Contract, and, if so, how fees and payment for additional work would be calculated. Further triable issues of fact exist as to whether other provisions of the Construction Contract were modified, waived, breached (individually or mutually), or simply disregarded by the parties: for example, the provisions governing progress payments, final payment, and the Owner's retainage; requirements for completion and/or substantial completion of the Project; adjustments, if any, to the explicit

guaranteed maximum price; all matters requiring bank, Owner, and/or architect approval; whether the provisions asserting time is of the essence, setting deadlines for the Project, and imposing liquidated damages for delays were modified or abandoned; and whether Owner's relationship with another architectural firm, Koko, impacted the Construction Contract's provisions concerning the Project's architect.

Accordingly, plaintiffs' motion for summary judgment on their complaint is denied.

Part II: Plaintiffs' Motion to Dismiss Defendants' Counterclaims

Plaintiffs move, pursuant to 3211 (a) (1), (6), and (7), to dismiss defendants' eight counterclaims in their entirety; however, in that discovery is complete and the note of issue has been filed, the court instead deems this application a motion to summarily dismiss the counterclaims under CPLR 3212.

Plaintiff contends that "H2 substantially completed the Project"; therefore, defendants are not entitled to damages—specifically, the $20,069,574.25 defendants claim to have incurred before H2 left the Project, and the $7,589,932.57 allegedly incurred after H2 left the Project—in light of the fact that "[a]l of the monies" claimed for H2's tenure "have been accounted for" as credits against the unpaid sums sought in plaintiffs' complaint and submissions in support of summary judgment. Plaintiffs assert that the sums sought for the period following H2's tenure on the Project were spent on "additional modifications and upgrades to the Project," not services or materials contemplated by the Construction Contract. Plaintiffs contend that "issuance of the original [Temporary Certificate of Occupancy (TCO)] represents substantial completion of the Project and indicates that H2 received [various] satisfactory passing inspections of the Project."

Defendants respond, generally, that dismissal must be denied because the claims and the counterclaims arise from the same Project and the same Design and Construction Contracts; thus, the original claims and defendants' "viable" counterclaims are inextricably intertwined, and triable issues of fact surrounding the transactions, agreements, and parties' conduct precludes granting plaintiffs' motion in all respects. Defendants further respond that plaintiffs never submitted written change orders, as required by the Construction Contract, and the parties' prior conduct in connection with the Design Contract—which contains a similar written requirement provision—demonstrates a course of conduct that supports defendants' counterclaims for breach of the Construction Contract.

The parties do not specifically address each of the eight counterclaims raised in the verified answer. Plaintiffs' assertion that they substantially completed their obligations under the Construction Contract is a triable issue of fact, as are all of defendants' counterclaims pertaining to the validity of plaintiffs' lien, damages arising from allegedly additional work, and whether the provisions of the Construction Contract were breached by plaintiffs. Further, issues of fact persist as to the remaining counterclaims sounding in negligent performance of the Construction Contract and alleging that plaintiffs abandoned the Project, as well as those counterclaims concerning plaintiffs' performance of obligations under the Design Contract.

Accordingly, it is

ORDERED that the motion of plaintiffs H2 CONSULTING P.E., P.C. and HARRY HONG for summary judgment, pursuant to CPLR 3212, is denied; and it is further

ORDERED that the motion of plaintiffs to dismiss the counterclaims, pursuant to CPLR 3211 (a) (1), (6), and (7), is denied; and it is further

ORDERED that the parties shall appear for trial in Part 48, Room 242 at 60 Centre Street, on 12/10/18 @ 10:00AM; and it is further
PRE-TRIAL CONFERENCE: 12/3/18 @ 10:00 AM

ORDERED that any motions in limine must be served no later than 30 days from this order.

~~9/24/2018~~ 9/24/18
DATE

ANDREA MASLEY, ESQ.
HON. ANDREA MASLEY

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE