New Ho Xin Dev. Inc. v 366 Kings HWY LLC
2020 NY Slip Op 31724(U)
June 2, 2020
Supreme Court, Kings County
Docket Number: 502423 /2014
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 502423 /2014

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NEW HO XIN DEVELOPMENT INC.,

Plaintiff,

-against-

DECISION/ORDER

366 KINGS HWY LLC

Defendant.

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The plaintiff, NEW HO XIN DEVELOPMENT INC., commenced this action seeking damages in the amount of $20,000, with interest from July of 2012, and $10,000, with interest from February of 2013, claiming that the defendant, 366 KINGS HWY LLC, failed to fully pay for certain construction work that it performed pursuant to a written contract. The defendant counterclaimed seeking damages in the amount of $9,523.00.

A bench trial was held before the undersigned on September 10, 2019 during which two witnesses testified, Xing He Chen, the President of the NEW HO XIN DEVELOPMENT INC., and Sai Troung, the manager of 366 KINGS HWY LLC. After considering and evaluating the testimony and other evidence introduced at trial and having the opportunity to assess the credibility of the witnesses, the Court makes the following findings of fact and conclusions of law:

Background:

The defendant was the owner of real property located at 366 Kings Highway, Brooklyn, New York (“the property”). On or about July 26, 2011, the plaintiff and the defendant entered into a written contract pursuant to which the defendant agreed to pay the plaintiff the sum of $460,000 to perform various construction work in connection with the construction of a multi-unit condominium building. It is undisputed that the defendant only paid the plaintiff $430,000.

Pursuant to item 14 (c) of the contract, the defendant was required to pay the plaintiff the sum of $20,000 after the completion of the pedestrian sidewalk in front of the building. Pursuant to item 14 (d) of the contract, defendant was required to pay the plaintiff the sum of $10,000 after the building passed the Department of Buildings (DOB) inspection. The building passed the DOB inspection in February of 2013. Defendant paid neither of these sums.

Defendant maintains that it did not pay plaintiff for the sidewalk because the work did not initially pass inspection by the DOB because the roadway was damaged. Defendant contends that the plaintiff's workers damaged the roadway during the removal of the old sidewalk and that it cost it $5200 to have the roadway repaved. Defendants further claim that the plaintiff improperly constructed the roof, the chimney and the balconies, all of which had to be corrected, and that the faulty roofing work caused water damages to some of the units in the building, which had to be repaired.

Testimony of Mr. Chen:

Mr. Chen is plaintiff's CEO. He testified that pursuant to the written contract his company entered into with the defendant, his company was required to perform cement, carpentry and steel/iron work at the property. This work included the installation of a new pedestrian sidewalk. He maintained that his company completed the sidewalk by December of 2012 and that it passed inspection around that time defendant's engineer. He further maintained that all the other work his company was required to perform under the contract had been completed by July of 2012. He acknowledged that at the very end of the job, the DOB had to inspect and sign off on his company's work before issuing a Certificate of Occupancy. In this case, the work passed the DOB's inspection in February of 2013.

Mr. Chen testified that all the work his company performed under the contract, including the work on the chimney, was done in accordance with the blueprints that he was provided with by the defendant. Defendant's engineer approved the work that his company performed in connection with the construction of the chimney in July of 2012.

Mr. Chen came to learn that the chimney did not initially pass inspection. Apparently, the DOB refused to sign off on the chimney because they could not confirm that the lining was properly installed because the chimney was closed. Mr. Chen acknowledged being contacted by the defendant requesting that he send someone down to open up the chimney so the DOB could see if the chimney was properly constructed. He refused this request because it would cost him money to do this. He also claimed that no one told him to keep the chimney open so the DOB could perform its inspection. In fact, he testified that he offered to keep the chimney open and was told by the defendant to just to follow the blueprints, which he did. He denied that his company damaged the roadway in front of the building during the installation of the new sidewalk.

Testimony of Mr. Truong:

Mr. Troung testified that in order to construct the new pedestrian sidewalk, plaintiff had to first demolish the old sidewalk, which included removing the old curb and installing a new one. He maintained that after plaintiff's workers installed the new curb, they left a depression in the roadway by the curb which ran across the entire length of the building and which was approximately 7-8" deep and 16" wide. He did not produce any photographs depicting this alleged condition nor did he produce any documentary evidence of its existence. He claimed that he asked one of plaintiff's employees to fix this condition and that his request was ignored.

Sometime in July of 2012, after plaintiff had completed its work at the property, Mr. Troung asked Mr. Chen's younger brother to fix the roadway. He testified that his request was again ignored. Because of this condition, the building not pass the DOB's initial inspection. Mr. Troung claims that in order to fix the roadway so that the work would pass inspection, he hired a company by the name of Allied Asphalt and paid them $5200 to repave the roadway. Once Allied Asphalt competed its work, the work passed the DOB's final inspection. Significantly, it was not part of plaintiff's obligations under the contract to do any work on the roadway.

Mr. Truong testified that in February of 2013, he along with his wife, Mrs. Vuu, who was a member of the defendant limited liability company, inspected the building and observed water damage on the 5th and 6th floor apartments. After discovering the water damage, Mr. Truong and Ms. Vuu went up to the roof and observed what he described as gaping holes or openings through which water was seeping down into the units in the building. He maintains that he informed the plaintiff of this, but the plaintiff did not do anything to correct the situation. He ultimately hired a contractor by the name of Mr. Lin and paid him $14,823.00 to repair the water damage allegedly caused to the apartments in the building. He also claims that he had to pay a roofing contractor by the name of Guaranteed Roofing the sum of $16,500 to repair and to properly waterproof the roof.

Mr. Truong also testified that the plaintiff did not properly construct the balconies and that he had to pay Mr. Lin $1500 to make the necessary repairs. Finally, he testified that because the plaintiff did not properly construct the chimney, he had to pay Mr. Lin $1500 to perform additional work on the chimney so that it would pass the DOB inspection.

To summarize, defendant contends that the total cost of repairing the damage to the roadway, the roof, the balconies and chimney and the cost of repairing the water damage caused

by the improper roofing work was $ 39,523.00. While the defendant acknowledged that it did not pay the plaintiff the remaining $30,000 owed under the contract, defendant contends that when you take into account the amount of money it had to pay to have the above work done, it is out of pocket the sum of $9523.00.

Discussion:

To establish its claim of breach of contract, the plaintiff was required to demonstrate by a preponderance of the evidence, the existence of a contract, its performance under the contract, that the defendant breached the contract, and that it was damaged as a result of the breach (*see JP Morgan Chase v. J.H. Elec. of New York, Inc.*, 69 A.D.3d 802, 803, 893 N.Y.S.2d 237, 239 *Agway, Inc. v. Curtin*, 161 A.D.2d 1040, 1041, 557 N.Y.S.2d 605; *Furia v. Furia*, 116 A.D.2d 694, 695, 498 N.Y.S.2d 12). Even where a contract is devoid of any express provisions regarding the nature of performance, "[a]s a general rule, there is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently and in a workmanlike manner" (N.Y. Prac, Contract Law § 11:14 [Note: online treatise]; *Lino Del Zotto & Son Builders Inc., v. Colombe*, 216 A.D.2d 778, 779; *Fairbairn Lumber Corp. v. Telian*, 92 A.D.2d 683, 684). Here, there's no question that the parties entered into a contract. Mr. Chen's testimony sufficiently demonstrated that the plaintiff performed its obligations under the contract and that the defendant breached the contract by failing to pay the plaintiff the sum of $30,000.

The defendant did not demonstrate that some of the work plaintiff performed was done in an unskillful and unworkmanlike manner. The only evidence introduced to support defendant's claim on this issue was the self-serving testimony of Mr. Troung. Not only is Mr. Troung an interested witness, he did not lay a proper foundation that he has the requisite special knowledge to render opinions as to whether plaintiff's work was performed improperly. He gave no

testimony as to how plaintiff deviated from the blueprints nor did he establish that the various issue that arose were a result of improper work as opposed to defective design.

For the same reasons, the court finds for the plaintiff on defendant's counterclaim. The gravamen of defendant's counterclaim is that the plaintiff breached the contract by failing to perform the some of the work under the contract in a skillful and workmanlike manner. As stated above, defendant failed to meet its burden of proof on this issue. Moreover, even if the Court were to find that the plaintiff performed its work unskillfully and in an unworkmanlike manner, the defendant was still required to prove damages. Upon a showing that plaintiff's work was done unskillfully and in an unworkmanlike manner, defendant would have been entitled to recover the "reasonable cost of repair and/or the "reasonable cost" to complete the work (see 13 N.Y.Jur., Damages, § 58, p. 506; *see Bellizzi v. Huntly Estates,* 3 N.Y.2d 112, 115, 143 N.E.2d 803; *City School Dist. of City of Elmira v. McLane Constr. Co.,* 85 A.D.2d 749, 445 N.Y.S.2d 258, *mot. for lv. to app. den.* 56 N.Y.2d 504, 451 N.Y.S.2d 1026, 436 N.E.2d 1345). Defendant presented no evidence demonstrating that the amounts that it paid to the various contractors to repair and/or complete plaintiff's work were reasonable.

Finally, the defendant did not prove by a preponderance of the credible evidence that plaintiff's workers damaged the roadway in front of the building while removing the old sidewalk or that the reasonable cost to repair such damage was $5200.

In sum, plaintiff was entitled to be paid the sum of $20,000 when it completed the work on the sidewalk, which was in July of 2012, and the sum of $10,000, when the building passed the DOB's final inspection, which was in February of 2013.

For all of the above reasons, it is hereby

ORDERED AND ADJUDGED that the plaintiff may enter a judgment against the defendant in the amounts of $20,000, with interest from July 31, 2012, and $10,000, with interest from February 28, 2013, together with costs and disbursements.

Dated: June 2, 2020

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020