White Custom Kitchen & Woodwork Corp. v Elektra Acquisitions, LLC
2020 NY Slip Op 32159(U)
July 1, 2020
Supreme Court, New York County
Docket Number: 653575/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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WHITE CUSTOM KITCHEN & WOODWORK CORP.,

Plaintiff,

- v -

ELEKTRA ACQUISITIONS, LLC, ADELLCO MANAGEMENT LLC

Defendant.

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INDEX NO. 653575/2018

MOTION DATE 10/18/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, (i) White Custom Kitchen & Woodwork Corp.'s (the **Plaintiff**) motion for summary judgment is granted solely as to liability and (ii) and Elektra Acquisitions, LLC (the **Defendant**)'s cross-motion for partial summary judgment that the Plaintiff is precluded from recovering lost profits pursuant to Paragraph 13.2 of the Contract (hereinafter defined) is granted.

The Relevant Facts and Circumstances

Reference is made to a Trade Contract (the **Contract**; NYSCEF Doc. No. 2), dated March 31, 2016, by and between Plaintiff and Defendant, whereby the Defendant sought to renovate 166 kitchens in various apartment units at 290 Third Avenue, New York, New York (the **Project**) and the Plaintiff was to perform this work. Adellco Management LLC was appointed to act as the Defendant's representative for the Project (*id.*, ¶ 1.1).

The Contract provided that the Plaintiff would perform certain "Work" as follows:

> **2. Contract Documents**
>
> ***[Plaintiff] shall perform the work***, provide labor, materials, supplies, supervision, equipment, scaffolding, layouts, engineering, shop drawings, permits, temporary utilities, accessories, tools, services, overtime, testing, transportation, unloading, handling, hoisting, and all other items required in connection with the satisfactory performance, execution and completion of the work (collectively, the "Work") and ***in strict accordance with this Agreement and the drawings, specifications, general conditions and special conditions applicable to the Work and annexed hereto as Exhibit A*** (collectively, "Contract Documents") …

(*id.*, ¶ 2 [emphasis added]).

Exhibit A to the Contract included a printout entitled "166 Unit Kitchen Replacement Project" which set forth a fee schedule, among other things, that applied to 162 standard kitchens, but did not include the super's unit or 3 penthouse units (*id.*).

The Contract also provided that the Defendant would pay the Plaintiff $16,262.56 per kitchen, with a maximum contract price of $2,699,751.20. However, the Plaintiff could only work on six kitchens at a time and the Plaintiff could not commence such work without the Defendant's prior written approval:

> **11. Contract Price and Payment**
>
> **11.1** Owner agrees to pay Trade Contractor for the timely, full and satisfactory completion of the Work, and the performance of the obligations set forth herein and in the Contract Documents, the sum of Sixteen Thousand Two Hundred Sixty Three Thousand Dollars and Fifty Six Cents ($16,262.56) per Kitchen ("Contract Price") in a total amount not to exceed Two Million Six Hundred Ninety Nine Thousand Seven Hundred Fifty One Dollars and Twenty Cents ($2,699,751.20). ***Trade Contractor shall perform Work on only six (6) Kitchens at a time*** (each "Six Kitchen Set"), a***nd Trade Contractor shall not be permitted to proceed to commence Work on a new Six Kitchen Set without Owner's prior***

written approval. Trade Contractor acknowledges that the drawings and specifications may not be fully developed, and has included in the Contract Price all such amounts necessary to complete the Work, as can reasonably be inferred from the drawings and specifications.

(*id.*, ¶ 11.1 [emphasis added]).

Further, the Contract specified that the Plaintiff waived and released all claims for lost profits:

13. Time Extension

...

13.2 Trade Contractor agrees that it shall not be entitled to, nor claim any cost reimbursement, compensation or damages for, any delay, obstruction, hindrance or interference to the Work. ***Notwithstanding any term or provision herein to the contrary, Trade Contractor expressly waives and releases all claims or rights to recover lost profit (except for profit on work actually performed), recovery of overhead (including home office overhead), and any other indirect damages, costs or expenses in any way arising out of or related to the Agreement, including the breach thereof by Owner, delays, charges, acceleration, loss of efficiency or productivity disruptions and interferences with the performance of the Work.***

(*id.*, ¶ 13.2 [emphasis added]).

In the event of a dispute between the parties, the Plaintiff was required to make a claim in writing to the Defendant within 15 days after the Plaintiff first identified the condition giving rise to the claim and failure to provide such written notice would render the claim void:

19. Rights and Remedies

...

19.3 Any claim asserted by either party ("Claim") must be made by written notice and timely served, as called for herein, and pursuant to the time requirements set forth in this Agreement, upon Owner or Trade Contractor as the case may be. The responsibility to substantiate any Claim shall rest with the party making such Claim.

19.4 ***Claims by Trade Contractor must be made in writing to Owner within fifteen (15) days after Trade Contractor first identifies the condition giving rise to the Claim.*** An additional Claim related in any fashion to an earlier Claim that has been properly made

must be initiated in full conformity with the requirements of this Section 19.4 and will be void unless submitted in such timely manner. ***The failure to provide written notice of a Claim within the time provided for in this Section 19.4 shall render such Claim void and preclude any later assertion thereof by Trade Contractor.***

(*id.*, ¶¶ 19.3-19.4 [emphasis added]).

The Defendant had the right to terminate the contract with three days written notice to the Plaintiff if the Plaintiff failed to comply with any provisions of the Contract. The Defendant could also terminate the Contract at any time without cause upon providing three days written notice to the Plaintiff, and such termination relieved the Defendant of any obligation to pay for lost profits on work not performed:

24. <u>Termination</u>

…

24.1 ***If Trade Contractor shall fail to comply with any of the provisions or obligations under this Agreement … Owner shall have the right after three (3) days' written notice to Trade Contractor, to terminate, in whole or part, Trade Contractor's employment under this Agreement,*** and to take possession of Trade Contractor's materials, tools, plant, equipment and appliances used or to be used for the construction, whether on or off the Site, (and for that purpose to enter the premises of Trade Contractor) and to cause the entire remaining Work to be finished and the materials therefore to be furnished by another trade contractor Owner deems fit; and Trade Contractor shall not be entitled to any further payment until all the Work specified in this Agreement shall be finished and then accepted by Owner, at which time, if the unpaid balance of the amount to be paid under this Agreement shall exceed the expense incurred by Owner in finishing the Work, including overhead, attorneys' fees and damages incurred through the default of Trade Contractor, such excess shall be paid to Trade Contractor, but if such expense shall exceed such unpaid balance, Trade Contractor shall pay the difference to Owner …

24.2 ***Owner may terminate, in whole or part, this Agreement for convenience at any time without cause upon three (3) days prior written notice to Trade Contractor***. If terminated for convenience by Owner, it will pay the lesser of: (a) actual value of Work (based on approved schedule of values) earned up to the date of termination plus reasonable, actual, documented demobilization costs; or (b) actual costs incurred by Trade Contractor together with a reasonable markup for profit in accordance with the Contract Documents. ***Upon such a termination, Owner will have no further obligation to Trade Contractor nor shall Owner be obligated to pay for (and Trade Contractor hereby waives)***

> ***any lost profits on Work not performed***, lost bond capacity or other type of expenses or damages. If Owner terminates this Agreement pursuant to Section 24.1, and it is ultimately decided by a court of law that Trade Contractor has not failed to comply with any of the provisions of this Agreement or should not have had this Agreement terminated as the result of Trade Contractor or any of its officers being indicted or the subject of a governmental investigation or as a result of failure to terminate its subcontractor as the result of the subcontractor of Trade Contractor or any of its officers having been indicted or the subject of a governmental investigation, such termination shall be treated as a termination for convenience pursuant to this Section 24.2 and Trade Contractor shall have no further or additional recourse in connection with such termination.

(*id.*, ¶¶ 24.1-24.2 [emphasis added]).

The Plaintiff performed renovations on 49 kitchens with the last renovation completed on or about May 30, 2017 (NYSCEF Doc. No. 42, at 92-96). At or around this time, the Defendant advised the Plaintiff that Graystar would take over as project manager for the renovations (NYSCEF Doc. No. 42, at 95:15-23, 117:3-10). By two emails respectively dated June 21, 2017 and June 27, 2017, the Plaintiff's manager, Eli Alkobi, asked the Regional Property Manager for Greystar, Jonathan Vayner, which units would be released for renovations (NYSCEF Doc. No. 27 at 6-7). In an email response on June 28, 2017, Mr. Vayner advised that he would "speak with the team and let [Mr. Alkobi] know" (*id.* at 5-6).

By email dated August 3, 2017, Mr. Alkobi again asked Mr. Vayner to provide a list of units for renovation because the Plaintiff had materials sitting pending the next schedule (*id.* at 5). By letter also dated August 3, 2017, the Plaintiff wrote to the Defendant and Greystar (i) requesting that a unit schedule for the next round of renovations be provided upon receipt of the letter and (ii) advising that payment was outstanding on certain invoices, including completed work at apartments 7D and 11D, and requesting payment upon receipt of the letter (NYSCEF Doc. No. 33). In five emails respectively dated August 3, 2017, August 11, 2017, August 31, 2017,

September 5, 2017, and September 7, 2017, Mr. Alkobi again requested outstanding payment from Mr. Vayner (NYSCEF Doc. No. 27, at 2-5).

By email, dated September 13, 2017, Mr. Alkobi wrote to Mr. Vayner to advise that the invoices were 90 days past due and that payment was expected by Friday before the matter would be turned over for collection (NYSCEF Doc. No. 27, at 2). In an email response, dated September 13, 2017, Mr. Vayner advised Mr. Alkobi that their accounting group was unable to process payments and would provide a further update (*id.* at 1). By email, dated September 19, 2017, Mr. Alkobi asked Mr. Vayner again if payment was sent (*id.*). Although Defendant did not respond, the Plaintiff was paid for the outstanding invoices for apartment units 7D and 11D at an unspecified time afterwards (NYSCEF Doc. No. 42 at 132:17-21).

By letter, dated April 30, 2018, the Plaintiff's counsel wrote to the Defendant and Greystar to advise of its belief that the Defendant was in default of the Contract because no notice of termination was issued in accordance with the Contract (the **April 2018 Letter**; NYSCEF Doc. No. 33). The Plaintiff's counsel also advised that if a response were not received within seven days thereafter, the Plaintiff would pursue its legal remedies (*id.*).

On July 18, 2018, the Plaintiff commenced this action for (i) wrongful termination of the Contract, (ii) breach of contract for failure to order additional renovations for the remaining apartments, (iii) breach of contract for failure to pay for construction materials, (iv) lost profits, and (v) breach of the implied covenant of good faith and fair dealing.

By a stipulation, dated October 16, 2019, the action was discontinued as against Adellco Management LLC (NYSCEF Doc. No. 37). The Plaintiff now moves for summary judgment on its Complaint and the Defendant cross-moves for partial summary judgment.

Discussion

On a motion for summary judgment, the movant "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], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

A. Plaintiff's Motion for Summary Judgment

The Plaintiff argues that summary judgment should be granted because the Defendant breached the Contract by failing to provide (i) a list of units for renovation and (ii) proper notice of termination. In opposition, the Defendant argues that the instant motion should be denied because the Defendant did not breach the Contract and, instead, that it terminated the Contract, but that even if there was a breach of Contract, the Plaintiff failed to provide timely notice of its claim as required by the Contract.

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Here, the Contract provided that the Plaintiff was to perform its work in accordance with the "Contract Documents," which contemplated a "166 Unit Kitchen Replacement Project" (NYSCEF Doc. No. 2, Ex. A). Inasmuch as the Defendant argues that the Plaintiff did not have a right to renovate all 166 kitchens because the Plaintiff could only work on six kitchens at a time with written approval of the Defendant, this restriction merely limited the manner in which the Plaintiff would perform the renovations over time, permitting the Defendant to decide the order of the renovations, but did not reduce the overall scope of the Contract as that scope was defined in the Contract (*id.*).

The record indicates that the Defendant authorized renovations on 49 of the 166 kitchens, which the Plaintiff performed. After the last of the 49 kitchens was renovated on May 30, 2017, it is undisputed that the Defendant did not authorize any further work and that the Defendant never terminated the Contract in accordance with Paragraph 24 of the Contract. Under these circumstances, the Plaintiff has met its burden coming forward with prima facie evidence of the Defendant's breach.

In its opposition papers, the Defendant fails to raise a material issue of fact because it does not establish that the Contract was properly terminated, for cause or otherwise, as it never gave notice of termination as required for both a for cause and a for convenience termination. Rather,

the Defendant simply ignored its obligations under the Contract. To the extent that the Defendant argues that the Plaintiff failed to provide timely notice of its claim because the Plaintiff should have known by September 19, 2017 that the Contract was terminated, the Defendant's argument fails.

In an email, dated September 13, 2017, Mr. Vayner advised Mr. Alkobi that Greystar's accounting group was unable to process payments and would provide a further update (NYSCEF Doc. No. 27, at 1). By email, dated September 19, 2017, Mr. Alkobi followed up to ask Mr. Vayner for the final time if payment was sent (*id.*).

Nothing in the Defendant's correspondence demonstrates that the Defendant either terminated the Contract or would not perform in the future by releasing additional units pursuant to the Contract. The Defendant's silence given its previous promises of payment simply are insufficient to raise a material issue of fact as to whether as of September 19, 2017 the Contract was terminated. Put another way, inasmuch as the Defendant fails to adequately identify a time in which the claim accrued, the claim can not be said to be untimely. To the extent that notice was required, the April 2018 Letter gave the Defendant adequate notice of the Plaintiff's claim. Accordingly, summary judgment on liability is granted.

With regards to its damages, the Plaintiff seeks $651,714 in lost profits, $139,548.40 in actual costs, and $31,774.67 for the balance of the 49 renovations completed (NYSCEF Doc. No. 23, ¶¶ 18-20). However, as discussed above, Paragraph 13.2 of the Contract provides that:

> … Notwithstanding any term or provision herein to the contrary, ***Trade Contractor expressly waives and releases all claims or rights to recover lost profit (except for profit on work actually performed), recovery of overhead (including home office overhead), and any other indirect damages, costs or expenses in any way arising out of or related to the Agreement, including the breach thereof by Owner***, delays, charges, acceleration, loss of efficiency or productivity disruptions and interferences with the performance of the Work.

(NYSCEF Doc. No. 26 [emphasis added]).

The above provision is clear that the Plaintiff waives all claims for ***lost profit, recovery of overhead, and any other indirect damages, costs, or expenses*** that arise out of the Contract. In other words, the waiver of damages as set forth in Paragraph 13.2 of the Contract is not restricted to situations involving the Defendant's delay, but such waiver applies broadly to any breach of the Contract by the Defendant. Thus, to the extent that the Plaintiff seeks lost profits, this is barred by the Contract. The Plaintiff also fails to state a prima facie case for its other damages as the adduced evidence consists of a summary chart without any invoices, receipts, or other supporting documentation, which is not sufficient evidence in admissible form. Accordingly, the matter of damages will be severed and reserved for trial.

B. Defendant's Cross-Motion for Partial Summary Judgment

For the reasons set forth above, the branch of the Defendant's cross-motion for partial summary judgment that the Plaintiff is precluded from recovering lost profits pursuant to Paragraph 13.2 of the Contract is granted.

For the avoidance of doubt, although Paragraph 24.2 of the Contract also relieved the Defendant of paying lost profits to the Plaintiff, this waiver was expressly conditioned on the Defendant's

termination of the Contract for cause with three days written notice, which notice was not provided. As a result, it is Paragraph 13.2 and not Paragraph 24.2 that bars the Plaintiff from recovery.

Accordingly, it is

ORDERED that the Plaintiff's motion for summary judgment is granted solely as to liability; and it is further

ORDERED that a trial of the issues regarding damages shall be had before the court; and it is further

ORDERED that Plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the Part 40 Trial Calendar for such trial at the earliest available date; and it is further

ORDERED that the Defendant's cross-motion for partial summary judgment that the Plaintiff is precluded from recovering lost profits pursuant to Paragraph 13.2 of the Contract is granted.

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7/1/2020
DATE

ANDREW BORROK, J.S.C.

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