

Citi Bldg. Renovation, Inc. v Neelam Constr. Corp.
2020 NY Slip Op 34146(U)
December 9, 2020
Supreme Court, New York County
Docket Number: 655896/2016
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK

PART IAS MOTION 53EFM

Justice

-----X

CITI BUILDING RENOVATION, INC.

INDEX NO. 655896/2016

Plaintiff,

- v -

NEELAM CONSTRUCTION CORP.,

**POST TRIAL DECISION AND
ORDER**

Defendant.

-----X

This case involves a dispute between Neelam Construction Corp. (**Neelam**), a contractor, and Citi Building Renovation (**Citi**), a subcontractor, arising out of a certain sub-contract (the **Original Sub-Contract**; NYSCEF Doc. No. 44), dated January 27, 2009, by and between Neelam and Citi, as amended, pursuant to which Neelam and Citi performed certain work in connection with the Harlem River Houses (the **Project**). The price set forth in the Original Sub-Contract was \$2,400,000. The Project is operated by the New York City Housing Authority (**NYCHA**). The construction manager on the project was HAKS. The parties agree that the Original Sub-Contract was modified pursuant to a Modification (the **Modification**; NYSCEF Doc. No. 45), dated August 5, 2010, by and between Neelam and Citi, when NYCHA and HAKS changed the scope of work as it relates to certain glazed tile work and required Neelam to perform certain asbestos work not originally contemplated by the agreement between Neelam and NYSCHA and HAKS. However, the parties disagree as to how the Modification modified the Original Sub-Contract.

OTHER ORDER – NON-MOTION

Citi contends that pursuant to the Modification, the Original Sub-Contract was modified by (i) deleting \$575,000, the amount allocated to certain block glazed tile work, (ii) adding \$600,000 for certain additional work not contemplated by the Original Sub-Contract, and (iii) that the parties agreed to \$288,000 as a final fixed price for certain additional glazed tile work, for a new Sub-Contract price of \$2,713,000. Neelan, on other hand, agrees that the Original Sub-Contract was modified by (i) deleting \$575,000, the amount allocated to certain block glazed tile work and (ii) adding \$600,000 for certain additional work not contemplated by the Original Sub-Contract. However, Neelam contends that the parties did not agree to \$288,000 as a final fixed price for the additional glazed tile work. Instead, according to Neelam, the parties agreed that Citi's proposal was for \$288,000 and that Citi would receive from Neelam whatever Neelam obtained for this work from HAKS and NYCHA. In other words, according to Neelam, the result of the Modification was that the Original Sub-Contract was modified to make the new price \$2,425,000 plus whatever Neelam obtained from NYCHA and HAKS, as this amount still needed to be negotiated from the revised scope of the glazed tile work.

In addition, Citi contends that Neelam and Citi entered into a second modification pursuant to which Neelam agreed to pay an additional \$40,000 for a separate, second glazed tile set of work (Ali Direct Testimony Aff., ¶ 8, NYSCEF Doc. No. 62).

Citi brought this lawsuit claiming monies due under the Original Sub-Contract, as amended, and asserted the following four causes of action: (i) breach of contract, (ii) breach of the implied covenant of good faith and fair dealing, (iii) promissory estoppel, and (iv) unjust enrichment based on Neelam's alleged breach of the Original Sub-Contract, and claimed damages of

\$426,688, plus interest. Neelam answered, claiming that (i) the lawsuit was barred by a certain release and lien waver (the **Release and Lien Waver**; NYSCEF Doc. No. 46), dated January 27, 2011, and that, (ii) in any event, Citi has been paid in full. During trial, Citi withdrew its second cause of action for breach of the covenant of good faith and fair dealing on the record (Record, 12-8-2020).

Previously, Neelam had brought a motion to dismiss based on the Release and Lien Waver. Pursuant to a Decision and Order, dated September 22, 2019, the court (Ramos, J.) held that issues of fact precluded dismissal based on the Release and Lien Waiver as the record on the motion demonstrated that subsequent to the date of the Release and Lien Waiver, Neelam had issued at least two checks. The first check was issued on January 28, 2011 for \$30,000, and the second check was issued on June 14, 2011 for 5,000. These checks, together with certain text messages between the parties, the court held, raised an issue of fact as to whether the Release and Lien Waiver was intended to be a final release of all of Neelam's obligations (NYSCEF Doc. Nos. 27, 21-22).

No motions *in limine* were brought in advance of trial in accordance with the court's pre-trial order dated October 7, 2020 (NYSCEF Doc. No. 40) and direct testimony of the witnesses at trial was admitted by affidavit.

In support of its position, at trial, Citi had two witnesses (Saleem Ali and Mohammed Rao), and the following exhibits:

- Marked Pleadings – NYSCEF Doc. No. 41 (jointly submitted)

- Motion to Dismiss Decision – NYSCEF Doc. No. 43 (jointly submitted)
- Ex. P-1 – Subcontract – NYSCEF Doc. No. 44
- Ex. P-2 – Modification – NYSCEF Doc. No. 45
- Ex. P-3 – Lien Waiver – NYSCEF Doc. No. 46
- Ex. P-4 – Handwritten Payment Ledger – NYSCEF Doc. No. 47
- Ex. P-5 – Typed Ledger – NYSCEF Doc. No. 48
- Ex. P-6 – Text Messages between Kanti and Saleem – NYSCEF Doc. No. 49
- Ex. P-7 – Cancelled Checks Dated 1-28 – NYSCEF Doc. No. 50
- Ex. P-8 – Bhanderi Deposition – NYSCEF Doc. No. 51
- Affidavit (corrected) of Saleem Ali – NYSCEF Doc. No. 62
- Affidavit of Mohammed Rao – NYSCEF Doc. No. 61

For the avoidance of doubt, the direct testimony affidavit of Mr. Rao was admitted without cross-examination, by stipulation of the parties on the record (Record, 12-8-2020), and cross-examination was waived.

In support of its position, at trial, Neelam had Kanti Bhanderi as its sole witness and offered the following exhibits:

- Kanti Bhanderi Affidavit – NYSCEF Doc. No. 52
- Ex. D-1 – Citi Proposal dated May 20, 2009 – NYSCEF Doc. No. 53
- Ex. D-2 – Saleem Ali’s breakdown of extra glaze block – NYSCEF Doc. No. 54
- Ex. D-3 – Saleem Ali’s breakdown of money owed dated September 16, 2015 –
NYSCEF Doc. No. 55

- Ex. D-4 – Trade Contract – NYSCEF Doc. No. 56
- Ex. D-5 – Saleem Ali Deposition dated May 1, 2019 – NYSCEF Doc. No. 57
- Ex. D-6 – Cancelled Checks sent to Citi – NYSCEF Doc. No. 58
- Ex. D-7 – Neelam’s Payment Requisition No. 23 – NYSCEF Doc. No. 59

Following trial, the court makes the following findings of fact and conclusions of law:

Findings of Fact

1. The parties entered into the Original Sub-Contract (Ex. P-1, NYSCEF Doc. No. 44).
2. The parties modified the Original Sub-Contract pursuant to the Modification (Ex.P-2, NYSCEF Doc. No. 45).
3. The Modification modified the Original Sub-Contract by (i) deleting \$575,000, the amount allocated to certain block glazing tile work, and (ii) adding \$600,000 for certain additional work not contemplated by the Original Sub-Contract. The Modification did not, however, include a final agreed upon amount of \$288,000. The Modification reflects Citi’s bid of \$288,000 but indicates that it is to be negotiated and that the prices in the Modification are final except as it relates to the glazed tile work. To the extent that Mr. Ali testified that in the circle next to “288” there appears a circled “F”, the testimony is not credible. First of all, the letter is a “K,” as Mr. Bhanderi testified (and that he wrote it) and as can be seen on the face of the document. Second, unlike the other items set forth on the Modification, this amount is not added into a new total.
4. Although Citi now tries to disavow its prior claims as to the exact amounts due and owing to it, as set forth in the direct testimony affidavit of Mr. Ali (NYSCEF Doc. No.

60) and Mr. Ali's prior sworn examination before trial dated May 1, 2019 (NYSCEF Doc. No. 57), and putting aside the incorrect reference to exhibit P-5 in Mr. Ali's direct testimony affidavit (NYSCEF Doc. No. 60, ¶ 18 [as discussed on the record 12-7-2020]), Mr. Ali's change in testimony as to what amounts are still owed to Citi is simply not credible. Mr. Ali states in his direct testimony affidavit that he received payments amounting to \$2,490,550 from Neelam (*id.*, ¶ 18), which is the same amount he testified he received at his deposition on May 1, 2019 (NYSCEF Doc. 57 at 30:16-19, 63:6), however, his trial testimony on redirect was that he received only \$2,398,846.60, with no credible explanation for this "mistake" in his prior testimony. Mr. Ali's direct testimony affidavit is also internally inconsistent as it seeks \$70,000 in connection with the "second glazed tile work" in the same sentence as it says that \$40,000 is owed for that work (e.g., NYSCEF Doc. No. 62, ¶ 9). To the extent that he was disputing any other amount, he identified no basis for such dispute.

5. Mr. Ali's trial testimony is also at odds with his own prior "breakdown" of what Neelam owes to Citi, which was provided to Neelam on or about September 16, 2015 (the **2015 Breakdown**; Ex. D-2, NYSCEF Doc. No. 55). Per the handwritten 2015 Breakdown, written and signed by Mr. Ali, the total sum owed by Neelam to Citi is \$385,150 (*id.*). However, at trial, Mr. Ali testified that he now believed the total amount owed to Citi was actually \$354,153.40 (Record, 12-8-2020). Mr. Ali failed to identify what, if anything, changed between September 2015 and now so as to justify the change in amounts that are allegedly owed. Mr. Ali simply failed to account for the discrepancy between these two numbers, or the other numbers claimed by him as recently as

November 6, 2020 in his direct testimony affidavit. He simply referred to all of the different numbers put forth as a “mistake” or a “miscalculation.”

6. The court finds there are simply too many mistakes in Mr. Ali’s testimony. Each time that it was pointed out to Mr. Ali that his numbers did not add up, he came up with a different number as to what was received or owed. Yet, he adduced no evidence of what he actually received (e.g., such as evidence of what checks Citi actually received and cashed from Neelam).
7. The record does not reflect two different sets of tile work and inasmuch as the Modification referenced “extra glazed block” and “glaze tile,” Mr. Ali confirmed that both were references to the same tile work, and not a reference to two different tile projects.
8. There is insufficient evidence to support a factual finding of a second modification to the Original Sub-Contract. Thus, (i) the Original Sub-Contract together with the Modification was the agreement between the parties, (ii) the Original Sub-Contract as modified by the Modification shall hereinafter be referred to as the **Sub-Contract**, and (iii) the final Sub-Contract price was \$2,425,000 plus whatever NYCHA/HAKS paid for the modified glazed tile scope of work.
9. NYCHA/HAKS paid \$46,173.60 prior to March 10, 2011 as confirmed by requisition request no. 23 of even date, submitted as Exhibit D-7 (NYSCEF Doc. No. 59), for the modified glazed tile scope of work. Thus, the total Sub-Contract price was \$2,471,173.60. For the avoidance of doubt, the work was not performed during that period. The requisition request submitted in connection with obtaining that payment from NYCHA and HAKS is not in the record before the court, as Exhibit D-7 indicates

that the glazed tile work was done in a prior period and that the payment request was for other work.

10. On cross-examination of Mr. Bhanderi, Neelam admitted that it brought a lawsuit against NYCHA in connection with certain asbestos work and the glazed tile work and that its suit included a demand for \$288,000. None of the papers from this lawsuit are in evidence. In addition, it is not clear if the genesis of that lawsuit was that Neelam submitted a request for \$288,000 to try to get that money for Citi, which NYCHA and HAKS rejected. No requisition request in any such amount or otherwise, other than Exhibit D-7, is in the record. In any event, even if Neelam submitted a requisition request for \$288,000, which request, again, is not in the record, this would not necessarily lead to the conclusion that Neelam agreed to pay Citi \$288,000. Indeed, it is consistent with the notion that Neelam agreed that Citi's estimate was \$288,000 and they would get paid whatever NYCHA and HAKS paid as reflected in the language of the Modification.
11. Notwithstanding the ultimate agreement by NYCHA and HAKS to pay \$46,173.60, at some point in time, Neelam sent text messages to Citi offering to pay \$18,000 for the modified glazed tile. However, on the record before the court, it is unclear whether the \$18,000 offer was sent before or after NYCHA and HAKS agreed to pay \$46,173.60 for the work.
12. The total amount paid to Citi was \$2,490,812 in respect of the Sub-Contract (excluding check no. 393 in the amount of \$7,838.60 and check no. 611 in the amount of \$1,900, which Neelam concedes should not be credited to this Project). There are two different ledgers submitted in this case. Exhibit P-4, the handwritten ledger, differs from Exhibit P-5 in that it has (after crossing out the duplicate checks identified as items 1, 2, and 3)

two checks bearing the number 8566 on the handwritten ledger in the amount of \$20,000 each (items 56 and 34). Exhibit P-5, the typewritten ledger has a check (check number 5881/item 75) for \$30,000 that is not reflected on the handwritten ledger. In other words, the difference between the two ledger totals is \$10,000. The entry for check 5881, which is reflected on the typewritten ledger, Exhibit P-5, is also submitted by Neelam as evidence among the cancelled checks submitted as Exhibit D-6. Each check that is listed on Exhibit P-5 was submitted by Neelam in Exhibit D-6, as independently confirmed by the court on review of the evidence.

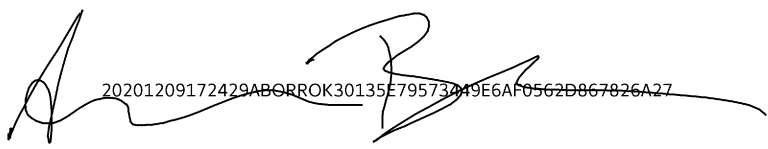
13. The Release and Lien Waiver was executed on January 27, 2011 (Ex. P-3, NYSCEF Doc. No. 46). Two checks were issued contemporaneously with the Release and Lien Waiver the next day (checks no. 644, 643), and four additional checks were issued some months later.

Conclusions of Law

1. A claim for breach of contract requires proof of an enforceable contract, the plaintiff's performance, a defendant's breach and resulting damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]).
2. The court finds that Citi has not met its burden on its first cause of action for breach of contract as it has not established that it is owed any additional compensation on the Sub-Contract. The total Sub-Contract price was \$2,471,173.60, and the record establishes that the total amount paid to Citi in respect of the Sub-Contract was \$2,490,812, i.e., \$19,638.40 more than what was owed.

- 3. Citi also failed to meet its burden on the third cause of action for promissory estoppel as the court does not find Citi has adduced evidence of an unambiguous promise to pay either the \$288,000 for the glazed tile work or the alleged additional \$40,000 pursuant to the purported second verbal change order (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409 [1st Dept 2017]).
- 4. Citi has failed to demonstrate that Neelam was enriched at Citi's expense so as to prevail on its unjust enrichment claim (*County of Nassau v Expedia, Inc.*, 120 AD3d 1178 [2d Dept 2014]).
- 5. For the avoidance of doubt, inasmuch as four checks were received some months after the execution of the Release and Lien Waiver, it cannot be said to be a final release and lien waiver so as to preclude the instant claims.
- 6. There is no basis on the record before the court for an award of attorneys' fees.

Based on the foregoing, all claims against Neelam are dismissed and the Clerk is directed to enter judgment dismissing this action in its entirety, with costs and disbursements as taxed by the Clerk to the defendant.



20201209172429ABORROK30135E79573049E6AF0562D867826A27

ANDREW BORROK, JSC

DATE: 12/9/2020

Check One:
 Case Disposed
 Non-Final Disposition

Check if Appropriate:
 Other (Specify _____)