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| <b>Lam Pearl St. Hotel LLC v Golden Pearl Constr. LLC</b>  |
| 2021 NY Slip Op 30224(U)   |
| January 22, 2021   |
| Supreme Court, New York County   |
| Docket Number: 657487/2017   |
| Judge: Barry Ostrager  |
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**SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY**

**PRESENT: HON. BARRY R. OSTRAGER PART IAS 61EF**

*Justice*

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LAM PEARL STREET HOTEL LLC,

Plaintiff,

- v -

GOLDEN PEARL CONSTRUCTION LLC, CNY GROUP LLC, KENNETH M. COLAO, and STEVEN COLAO,

Defendants.

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|-----------------|-------------|
| INDEX NO.       | 657487/2017 |
| MOTION DATE     |             |
| MOTION SEQ. NO. |             |

**DECISION AFTER TRIAL**

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HON. BARRY R. OSTRAGER

This case initially involved multiple allegations of wrongdoing by defendant Golden Pearl Construction LLC ("GPC") and the other named defendants. The Court initially dismissed all of the claims by plaintiff Lam Pearl Street Hotel LLC ("Lam Pearl") (*see* NYSCEF Doc. No. 71, January 17, 2018 Decision and Order, mot. seq. 001 and 002). But, by decisions and orders dated May 21, 2019 (NYSCEF Doc. No. 139, seq 003) and September 23, 2020 (NYSCEF Doc. No. 297, seq 006), this Court determined that plaintiff Lam Pearl could proceed to trial on its unjust enrichment claim arising out of an insurance premium refund that was received by GPC. The Court had previously dismissed the claims against all the defendants other than GPC on December 18, 2019 (NYSCEF Doc. No. 224, seq 004). Although Notices of Appeal were filed related to both the December 18, 2019 and the September 23, 2020 orders (NYSCEF Doc. Nos. 229 and 303), it appears neither appeal has been perfected. The Court has observed many times that the parties have spent almost as much money litigating this case as the amount at issue.

On January 5 and 6, 2021 this Court conducted a Microsoft Teams virtual bench trial at which five witnesses provided direct testimony by affidavit and were subjected to cross-examination. For the reasons that follow, the Court renders judgment for the sum of \$600,000 in favor of Lam Pearl against GPC with no prejudgment interest.

Lam Pearl is the owner and developer of a hotel project located at 215 Pearl Street, New York, New York. In August 2013, Lam Pearl retained GPC as the general contractor for the project. The contract was a "lump sum" contract which required GPC to complete the project for a stipulated sum in excess of \$50 million. The contract contained a line item for insurance in the sum of \$1,259,840, and Lam Pearl paid GPC \$1,138,103 at the outset of the project to cover the insurance costs of the project. GPC was invoiced \$1,030,481 for the first year of the project by its insurance agent.

At a relatively early stage of the construction project, at which point GPC had completed no more than 10% of the work contemplated by the 2013 contract, the parties entered into a Voluntary Termination Agreement effective December 18, 2014 that contained a limited release of claims against GPC "arising out of or related to work performed under the Trade Contracts, responsibility for ongoing operations including conditions at the project site, and any warranties or guarantees of GPC under the Contract." (NYSCEF Doc. No. 21). The Court ultimately determined that the release did not address which party was entitled to the approximately \$1 million insurance refund that was received after the parties executed the Voluntary Termination Agreement (NYSCEF Doc. 139).

Much of the testimony adduced at trial related to the issue of whether GPC had purchased "project specific" insurance that was dedicated solely to covering the Lam Pearl project and would be transferable from one general contractor to another or whether --as the undisputed testimony and documents presented at trial confirmed-- GPC never purchased project specific insurance but instead purchased a general practice policy with two excess layers that covered not only the Lam Pearl project, but three other projects. And, as the trial testimony established, GPC secured insurance payments from the sponsors of each of the other three projects.

The undisputed testimony further established that GPC retained all of the insurance payments for all four projects and financed the cost of the insurance for the four projects. When GPC ceased working on all the projects and the insurance was canceled, the insurance refund was paid to the party that financed the insurance on the four projects, at least one of which involved far more work by GPC than the work GPC had performed on the Lam Pearl contract. Lam Pearl waited until 2017 to commence this action, and its expert testified at trial that of the insurance premium Lam Pearl had paid, only approximately \$83,000 of the insurance premium was earned by the insurers during the period that GPC functioned on the Lam Pearl project.

At the conclusion of the trial, and after considering all the testimony and documents introduced at trial, the Court asked three questions which should have telegraphed to the parties the Court's understanding of the documentary and testimonial evidence. Specifically, the Court inquired:

- 1) Is it correct that there is record evidence indicating that Lam Pearl was aware that GPC was using practice policies in connection with the project?
- 2) Is there any evidence whatsoever that Lam Pearl was aware that the practice policy that was being used for the Lam Pearl project covered not only the Lam Pearl project but three other projects, and as such the aggregate limit of the policy could potentially have been exhausted by claims with respect to the three other projects that were included within the practice policy?
- 3) Did Lam Pearl have any reason to know or understand that GPC (a) charged each of the four different projects for the same insurance policy; and (b) financed the premium for the policy that each of the four project owners paid insurance for?

The short answer to each of these questions, based upon the credible testimony of the witnesses who testified at trial, is YES; NO; NO, but as to question 2 Lam Pearl should have known.

There is little question in the Court's mind that Lam Pearl received the name, address and telephone number of the broker, names of the general liability and excess insurers and the coverage provided. Lam Pearl and Lam Pearl's project manager and insurance advisor were

provided with GPC's insurance certificate. This information clearly put Lam Pearl on notice not only that GPC was utilizing a practice policy, but that appropriate inquiry would have revealed that GPC had not provided Lam Pearl with proper insurance. Even if it is the case--and it is--that a practice policy with appropriate aggregate limits would satisfy the requirements of the Department of Buildings ("DOB"), the policy that GPC provided was not what the parties had contracted for because the aggregate limit of the policy GPC obtained could potentially have been eroded by insurance payments on the three other projects. In short, notwithstanding the fact that GPC successfully obtained building permits for the Lam Pearl project, the insurance was not the insurance to which the parties had contractually agreed.

Lam Pearl's theory of liability against GPC is partially premised on the theory that Lam Pearl believed that GPC had obtained project specific insurance--which is assignable to a successor general contractor-- as opposed to a practice policy, which is not assignable. As noted, the Court does not credit the testimony of Lam Pearl's witnesses on this issue.

"The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff..." *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012) (citations omitted). "Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled..." *Id.*

The Court, with some doubt, accepts that in the context of a lump sum contract where the contractor bears the risk of cost overruns, the owner understands that various line items are estimates of costs that include anticipated profits. However, where, as here, the parties terminate the contract at an early stage, it is unreasonable to conclude that the insurance payment Lam Pearl made for the anticipated completion of 100% of the contracted for work should be treated the same way when the contract is terminated when only 10% of the work has been done. Thus,

whatever merit there is to GPC's claim that the existence of a "lump sum" contract allows a general contractor to pre-bill all estimated future insurance costs and retain the unused portion of the insurance has no relevance to a situation where, as here, the contract is voluntarily terminated shortly after it is executed and long before the contract is fully performed.

The Court is not prepared to find that defendant GPC engaged in any wrongdoing. But Lam Pearl's lack of diligence hardly pushes this case into the "voluntary payments" doctrine, as GPC contends. So, because unjust enrichment is an equitable doctrine, the Court must weigh all the equities to determine how much of the benefit defendant GPC directly or indirectly received should, in equity and good conscience, be returned to the plaintiff. By obtaining insurance that covered multiple projects, as opposed to the project specific insurance, by charging multiple parties for the premium while simultaneously obtaining financing to purchase the insurance, and by obtaining insurance for a shorter period of time than contemplated and obtaining a refund when the contract was terminated early, defendant GPC paid far less than the budgeted line item for insurance. This scenario resulted in a windfall to GPC at the expense of Lam Pearl, a windfall that equity and good conscience cannot abide. Moreover, because GPC insured the project with a non-assignable practice policy when Lam Pearl replaced GPC with another contractor, Lam Pearl had to pay for replacement insurance which Lam Pearl likely would not have had to do if GPC had obtained project specific insurance.

After weighing all the evidence, including the fact that with reasonable diligence Lam Pearl could have addressed the insurance issue in the Voluntary Termination Agreement and that Lam Pearl waited three years to advance this claim, and that the parties have almost spent the amount at issue litigating this case, the Court awards the plaintiff Lam Pearl the sum of \$600,000. The Court is reducing Lam Pearl's recovery in large measure because Lam Pearl had multiple opportunities to avoid the necessity for this exceptionally time consuming and

expensive litigation which has consumed inordinate judicial and party resources. And the Court, in its discretion, declines to award prejudgment interest. *See* CPLR § 5001(a)<sup>1</sup>; *see also Ostad v. Nehmadi*, 2019 WL 3413546 (Sup. Ct., NY Co.) (declining to award prejudgment interest for the equitable claim of unjust enrichment based on the discretion granted to the court by CPLR 5001).

Accordingly, the Clerk is directed to enter judgment in favor of plaintiff Lam Pearl Street Hotel LLC against defendant Golden Pearl Construction LLC in the sum of six hundred thousand dollars (\$600,000.00) with no prejudgment interest, but with interest accruing at the statutory rate of 9% per annum from the date of this decision through the entry of judgment as calculated by the Clerk of the Court, upon plaintiff's e-filing of a Proposed Judgment directed to the County Clerk. All other claims and cross-claims are, or have been, dismissed.

Dated: January 22, 2021

  
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BARRY R. OSTRAGER, J.S.C.

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<sup>1</sup>“Interest to verdict, report or decision. (a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, *except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.*” (emphasis added).