Hai Hong Constr. Corp. v NAB 2000 Realty LLC
2021 NY Slip Op 31604(U)
May 11, 2021
Supreme Court, New York County
Docket Number: 160345/2018
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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HAI HONG CONSTRUCTION CORP.,

Plaintiff,

- v -

NAB 2000 REALTY LLC,

Defendant.

----------X

INDEX NO. 160345/2018

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 71-112, 118, 119, 121-132

were read on this motion for summary judgment.

By notice of motion, defendant moves pursuant to CPLR 3212 for an order granting it summary judgment against plaintiff and dismissing the complaint, granting it summary judgment on its first counterclaim and directing the release to it of funds currently held in escrow, granting it summary judgment on its second counterclaim for breach of contract and referring the matter for an assessment on damages, and granting it leave to amend and supplement its answer. Plaintiff opposes.

I. BACKGROUND

A. Pleadings

1. Complaint (NYSCEF 1)

Plaintiff alleges that on or about March 25, 2018, it was hired by defendant to perform emergency service work at defendant's premises located at 2000 Second Avenue in Manhattan related to a fire that had occurred there a day earlier. It contends that it performed the required work and billed defendant accordingly for $217,945.35, and that defendant's property insurance

company, Seneca Insurance Company, issued a check for that sum payable to both plaintiff and defendant. To date, however, defendant refuses to endorse the check and/or to pay plaintiff for its work.

Plaintiff thus asserts as its first cause of action that defendant breached their agreement by failing to pay for its services, and, alternatively, as a second cause of action that defendant was unjustly enriched by plaintiff's services, and/or owes it for an account stated as its third cause of action.

2. Answer (NYSCEF 6)

In its answer, defendant admits that the parties entered into a written agreement, that its insurance company issued a check payable to it and plaintiff, and that it did not endorse the check, but otherwise denies plaintiff's allegations. It contends that plaintiff: (1) failed to perform the necessary work; (2) performed inadequate/defective work (e.g., defective shoring); (3) performed unnecessary work; and (4) charged for work that was not performed.

In supports of its counterclaims, defendant asserts that it maintained first-party property insurance through Seneca covering the premises, and that the premises were devastated by fire damage on March 24, 2018. Seneca deemed the property damage a "total loss," permitting payment to defendant of the policy limit for property damage of up to $1.5 million.

The same day of the fire, defendant retained New York Adjustment Bureau, Inc. (NYAB) to help it prepare and negotiate the insurance claim. Thereafter, NYAB retained plaintiff to perform the required emergency work at the premises, and "insisted" that defendant enter into an agreement with plaintiff to do so.

Defendant alleges that the agreement with plaintiff limited the work to that required by the New York City Department of Buildings (DOB), and provided that defendant would pay

plaintiff for properly completed work from the insurance proceeds received from Seneca. According to the work application and permit issued by the DOB on April 13, 2018, the estimated cost for the necessary emergency work was approximately $30,000.

Defendant alleges that on or about October 18, 2018, before it learned of the actual cost of plaintiff's services, Seneca issued a check to NYAB in the amount of $217,945.35 and payable to plaintiff and defendant. When defendant received the check, it requested an invoice from plaintiff.

According to defendant, plaintiff's invoice includes work that was never performed and/or was unnecessary or inadequate. It thus disputed the invoice and asked that Seneca re-issue the check solely in defendant's name. Instead, Seneca commenced an impleader action in this court, seeking to deposit the funds with the court pending resolution of this action. It was discontinued in January 2020.

As its first counterclaim, defendant seeks a judgment declaring that plaintiff is not entitled to the Seneca funds and that they should be paid to defendant only.
In its second counterclaim, defendant argues that plaintiff breached their agreement by performing more than the emergency work required by the DOB, and based on the same allegations, that plaintiff breached the covenant of good faith and fair dealing (third counterclaim) and would be unjustly enriched if permitted to retain the Seneca funds (fourth counterclaim).

C. Parties' agreement (NYSCEF 79)

The parties' agreement provides, as pertinent here, that defendant agrees that it does not have the money to pay for the emergency work required by the fire and that therefore, it wishes to have the insurance proceeds pay for the work. Plaintiff agrees to perform "emergency work

ordered by DOB," and that defendant would not be required to pay for the work but that instead plaintiff would be paid from the insurance settlement.

The following pre-printed language was crossed out by hand:

> After the signing of the Contract, we will provide you with an itemized list of the work that has to be done, known as "Schedule A," and which will be signed and agreed by you and by us. You will be furnished with a document which is called Proof of Loss which you will be required to sign. That "Proof of Loss" will state the exact amount that will be used to pay for the work from the insurance proceeds. We agree that we will furnish the same or similar materials as required in the schedule. However, we have the right to substitute material of equal quality the same or if the duplicate material is not available or would be proper for the completion of the work. Where there is a requirement for a repair or replacement, we will only replace those items that we feel are necessary to properly restore the premises and to repair those items which we feel can be repaired.
>
> . . . . .
>
> We will make certain that any violation issued by the Department of Housing and Building as a result of the fire to your property shall be dismissed.

In its place, the following handwritten language was inserted, "In this case we follow and work with DOB for work needed to be done." (*Id.*).

D. Plaintiff's work permit application and invoice (NYSCEF 78, 82, 83)

The work permit submitted by plaintiff on April 13, 2018 reflects that the scope of the work was defined as emergency shoring, bracing, and sealing of the fire-damaged building, at an estimated cost of $30,000. (NYSCEF 82, 83).

Plaintiff's undated invoice, after completion of its work, reflects that it performed clean-up, temporary bracing, and demolition on the second, third, and fourth floors, and removed debris and installed temporary electrical fixtures at a total cost of $217,945.35. (NYSCEF 78).

II. CONTENTIONS

A. Defendant (NYSCEF 72, 73, 74)

Defendant, through an affidavit of its principal and member, alleges that plaintiff failed to

perform the work required by the DOB, resulting in the issuance of DOB violations and, ultimately, a directive that the building be immediately demolished, which was due to plaintiff's failure to install braces and shore it against deterioration and collapse.

It submits the following DOB violations:

(1) March 24, 2018, the day of the fire: the metal cornice was fire-damaged and the parapet partially collapsed; the joists were split and damaged on the second, third, and fourth floors around the middle quarter of the building; the remedy was to install heavy duty sidewalk scaffolding, immediately remove loose exterior wall elements, hire an engineer to design and install shoring of the compromised floor structures, and file a work permit no later than 48 hours after the start of work (NYSCEF 80);

(2) April 4, 2018: additional fire damage included a leaning staircase, broken windows, and holes in the roof; defendant directed to retain a licensed engineer or architect to evaluate the building and prepare complete repair plans, which were to be filed with DOB no later than May 5, 2018, with the work to be completed by December 15, 2018 (NYSCEF 81);

(3) May 18, 2018: the pedestrian protection system did not meet code specifications in that the sidewalk shed was in place without vandal-proof fixtures installed on it (NYSCEF 84);

(4) August 3, 2018, September 18, 2018, and March 9, 2019: the April 4, 2018 violation had not been fixed as the required repair plans had not yet been filed with the DOB (NYSCEF 85, 86, 91); on May 11, 2019, the violation was resolved and dismissed (NYSCEF 92);

(5) November 19, 2018: the building was not being maintained in a safe condition, as temporary shoring was installed on all floors but was discontinuous between floor levels, as well as other problems, including a water leak to the cellar; the remedy was to retain a licensed engineer to evaluate the building and shoring and to design repairs and supplements as needed and to submit an application for the new work (NYSCEF 90);

(6) July 17, 2019: work permit issued on April 13, 2018 expired on February 10, 2019, and had not been renewed (NYSCEF 93);

(7) September 9, 2019: November 19, 2018 violation had not been fixed as no application for the needed work had been filed yet (NYSCEF 94); and

(8) November 8, 2019: temporary interior shoring and roof framing were disengaged and no longer supporting the building, which was on the brink of collapse and a public danger; defendant thus ordered to demolish the building immediately (NYSCEF 95); on March 5, 2020, the violation was dismissed as the required work was completed (NYSCEF 96).

On May 14, 2018 and August 16, 2018, an architectural and engineering firm retained by defendant examined the building and plaintiff's work. In a letter dated August 20, 2018, the consultant reports, as pertinent here, that:

> At the time of the site visit portions of the building's structural system were obscured from view due to remaining building contents, rubbish, and finish materials. During the site visit further deterioration of the structure was noted. Plaster and wood char fragments dislodged from the ceiling finishes and framing was observed, in addition to the debris observed previously. The proximate cause is likely additional movement within the structure. Deflection of the floor framing was noticeably larger than during the previous site visit, which is consistent with presence of the additional debris. Additional cracking and fracture of wood framing members was also observed. Cracking in the exterior masonry was noted to have progressed further including substantial deterioration at the wall to roof connection. At one location the parapet has experienced a partial, localized

> collapse. Deterioration of the roof decking has led to a steel column and beam punching through the roof.
>
> In reviewing the on-site repairs for consistency with the temporary shoring plans, it appears the recommended repairs were only partially completed. During the site visit the temporary, wood-frame shoring walls appear to have been installed according to the details of the plans. The shoring plans also include details for masonry repairs to be made to the exterior walls. No repairs to the exterior masonry were observed during the site visit.
>
> Based on the conditions observed by our office during the site visit conducted on August 16, 2018, the structure appears to have deteriorated further. Additional movement and redistribution of forces was observed, as a result the structure is considered to be marginally stable. It is recommended that the structure be demolished in an expedient manner. If demolition is not feasible at the present time further stabilization of the structure is recommended including, but not limited to: completing all the repairs recommended on the previously prepared shoring drawings; removal of all debris, rubbish, & construction waste; and installation of additional bracing at unsupported edges of framing members.

(NYSCEF 98).

The consultant supplements his report by affidavit dated August 3, 2020, in which he states that the shoring installed by plaintiff was insufficient and incomplete, leading to deterioration of the building's structure and ultimately, to defendant being forced to demolish the building. He denies that plaintiff had removed the debris as required and for which it billed Seneca. (NYSCEF 73).

Defendant thus maintains that plaintiff did not perform or improperly performed the required work, and that plaintiff has no documentation to support its claimed work, as it offers no receipts, notes, contracts or communications with others. Moreover, according the defendant, its invoice for over $200,000 worth of work allegedly performed is contradicted by the cost affidavit it submitted to the DOB when it applied for a work permit, in which it estimated that the work would cost approximately $30,000. (NYSCEF 72).

Defendant thus alleges that plaintiff committed fraud and engaged in fraudulent practices

when it submitted a fake invoice to Seneca. It thus seeks leave to amend its answer to add a counterclaim for fraud and deceptive business practices under the General Business Law (GBL).

B. Plaintiff's contentions (NYSCEF 121, 122)

According to plaintiff's vice president, plaintiff performed extensive work on the premises beginning on the date of the fire, including meeting with defendant's owner and insurance adjuster and DOB. From March 25, 2018, when they signed the agreement with defendant, they performed work on the premises, and such work was coordinated with and inspected by Seneca and the DOB.

In July 2018, the scaffolding company, which had been hired directly by defendant, received a violation from the DOB, and plaintiff assisted it in resolving the issue.

On July 19, 2018, plaintiff went to the premises for the final inspection of its work, but its key no longer worked and it could not access the premises, even with a spare key it obtained from the insurance adjuster. Its attempts to obtain access from defendant failed, and defendant advised that it would take care of the final inspection.

Apparently, DOB was also unable to gain access to the premises, and in October 2018, notified plaintiff that defendant was performing illegal demolition work on the top floor. On October 29, 2018, plaintiff visited the premises with its engineer and a DOB engineer and observed the illegal demolition work.

According to plaintiff, it is thus clear that defendant changed the locks in June or July 2018 to prevent plaintiff and DOB from inspecting the premises and discovering defendant's own illegal demolition work.

Plaintiff denies that the DOB violations referenced by defendant relate to work it performed at the premises, especially as the majority of the violations issued after plaintiff was

locked out of the premises. It also denies having committed fraud, observing that the purpose of the cost estimate submitted to the DOB was to obtain a permit, and that the actual cost of the work was unknown until the building was evaluated and DOB confirmed the work to be performed.

Plaintiff retained its own engineer, who inspected the premises in April 2018 and again in October 2018, and confirmed that plaintiff had performed the required work. The engineer also reports that the ultimate demolition of the premises was not caused by plaintiff's work or lack thereof, but rather by defendant's illegal work which caused the building to become unstable.

Plaintiff thus argues that it not only performed the work for which it invoiced defendant, but that Seneca, defendant's insurance company, inspected the work before issuing the check for it. Defendant's arguments, plaintiff contends, are merely an attempt to keep the money for itself as it had under-insured the premises and was forced to demolish it.

Plaintiff also maintains that the affidavits submitted by defendant's principals must be rejected as they contain lies and inaccuracies, and that during their depositions, they could answer almost no questions related to the premises, the fire, the work performed by plaintiff or the agreement with plaintiff.

Moreover, defendant's request for leave to amend its answer should be denied as party depositions have been held and thus it has unduly delayed in seeking such leave.

C. Defendant's reply (NYSCEF 132)

Defendant reiterates its prior arguments and contends that the reports of plaintiff's engineer may not be considered as they are unsworn and as plaintiff produced them only after defendant had moved for summary judgment and even though it had denied the existence of the reports. Moreover, the credibility of defendant's principals may not be considered on a summary

judgment motion.

Defendant also denies that it unduly delayed in seeking leave to amend its answer.

III. ANALYSIS

Even assuming that defendant meets its *prima facie* burden of establishing that plaintiff did not perform the agreed-upon work and that its failure to do so breached their agreement, plaintiff raises an issue of fact as whether it performed the work through its principal's affidavit, its engineer's site visit reports, and by proof that Seneca inspected its work before issuing a check for it. Defendant's reply, submitted by counsel only and not based on personal knowledge of the relevant facts, is insufficient to rebut plaintiff's claim that in July 2018, it was locked out of the premises by defendant and that anything that happened thereafter, including the issuance of DOB violations, had nothing to do with plaintiff's work or lack thereof. The deposition of defendant's principal also reflects a lack of personal knowledge or memory as to when plaintiff began or finished its work at the premises or any other details of defendant's dealings with plaintiff. Thus, her affidavit, to the extent it contradicts her testimony, is disregarded as feigned. (*See Rossi v 88th Garage Corp.*, 190 AD3d 504 [1st Dept 2021] [affidavit raised feigned issues of fact as it contradicted deposition testimony, where plaintiff testified that she did not remember certain details but then remembered them in affidavit]).

Defendant offers no authority for the proposition that it is or would be entitled to the insurance funds, as it agreed that plaintiff, as the party that performed the work, would receive those funds.

Moreover, while mere delay is not a sufficient reason to deny leave to amend a pleading, absent a showing of prejudice resulting therefrom (*Disla v Biggs*, 191 AD3d 501 [1st Dept 2021]), the proposed amendment must be meritorious (*Vista Engineering Corp. v Everest*

Indemn. Ins. Co., 190 AD3d 508 [1st Dept 2021]). Here, defendant's proposed claim for fraud is insufficient as a private contractual agreement between parties is not the type of consumer-oriented misconduct covered by GBL § 349. (*See Fekete v GA Ins. Co. of New York*, 279 AD2d 300 [1st Dept 2001] [trial court properly denied leave to amend to add claim for violation of GBL § 349 as claim arose from private dispute between parties and thus had no merit]; *see also Loeb v Architecture Work, P.C.,* 154 AD3d 616 [1st Dept 2017] [dismissing GBL § 349 claim as arising from private contract dispute between parties]).

Having agreed that plaintiff would be entitled to be compensated for its work through Seneca's issuance of funds under the insurance policy, and as Seneca apparently inspected plaintiff's work and deemed it complete, defendant offers no authority for the proposition that it may unilaterally refuse to endorse the check issued by Seneca and thereby prevent plaintiff from being paid for its work. Even if defendant's counterclaims have merit, it can proceed to trial on them, but in the first instance, and upon searching the record (CPLR 3212[b], plaintiff is entitled to the funds being wrongfully withheld by defendant.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is denied in its entirety; it is further

ORDERED, that upon searching the record (CPLR 3212[b]), summary judgment is granted on plaintiff's first cause of action for breach of contract; and it is further

ORDERED, that defendant is directed to endorse the check issued by Seneca and provide it to plaintiff within 20 days of the date of this order, or, upon submission by plaintiff of an affirmation of non-compliance by defendant of this order, judgment will be entered against

defendant in the sum of $217,945.35.

5/11/2021
DATE

BARBARA JAFFE, J.S.C.

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