SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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PENNONI ASSOCIATES, INC.,

Plaintiff,

- against -

PHOENIX DESIGN, LLC D/B/A PHOENIX DESIGN AND DEVELOPMENT, JAMES FRANCIS AND JOHANNA FRANCES A/K/A JOHANNA M.L. FRANCIS,

Defendants.

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DECISION AFTER TRIAL

Index No. 511583/2015

DEBRA SILBER, J.S.C.:

Plaintiff Pennoni Associates Inc. commenced this action against defendants Phoenix Design, LLC d/b/a Phoenix Design and Development (Phoenix), James Francis (James) and Johanna Francis a/k/a Johanna M.L. Francis (Johanna) by electronically filing a summons and complaint on September 22, 2015. The complaint asserts that plaintiff is an engineering/surveying company that was hired in 2008 by Phoenix (a construction/renovation contractor) for professional services; Phoenix agreed to pay plaintiff its usual rate pursuant to purchase orders and invoices. The pleading also asserts that James and Johanna are principals of Phoenix. Johanna denied this and averred that she has her own business. Next, plaintiff claims that by September 9, 2009, Phoenix owed plaintiff the principal balance of $217,574.09, and to continue to work for defendants, plaintiff asked Phoenix to enter into a letter agreement with personal guaranties from James and Johanna.

This agreement, the pleading continues, required Phoenix to make two payments, in September and November of 2009, and then to continue making monthly payments until the debt was paid in full by August 31, 2010. The agreement further states that any balance owed on August 31, 2010 would be satisfied by a balloon payment on that date. Plaintiff asserts that Phoenix made nine payments but, as of August 31, 2010, the principal balance of $202,167.00 remained, and Phoenix failed to make any balloon payment on that date. Moreover, plaintiff contends, the subject agreement provided that 6% interest per year would accrue on any unpaid sum. Also, plaintiff asserts that the subject agreement was personally guaranteed by Johanna and James. The complaint concludes by asserting that defendants are liable for the principal sum of $202,167.00, plus 6% interest per year from August 31, 2010. Lastly, plaintiff claims that defendants are liable pursuant to three causes of action: breach of contract, quantum meruit and unjust enrichment.

The 2009 agreement is dated September 9, 2009, and was attached as Exhibit A to the complaint. It is typed on Pennoni stationery, and is signed by Richard Roberts for plaintiff, by James Francis as Managing Director of Phoenix and again “personally,” and by Johanna Francis “personally”. There is an addition in handwriting, which was initialed by Mr. Roberts. It states, “In event there is an accounting error, it will be remedied.” This document is not solely addressed to past bills due. Paragraph 5 states “For all future engineering services provided by Pennoni, Phoenix will provide Pennoni with a list of requested services. Pennoni will provide an estimate of costs for the services for approval by Phoenix prior to commencement. Phoenix will pay 50% of the fee up front and the

remaining 50% upon completion of the services." Paragraph 6 states "Pennoni's fees will be personally guaranteed by you and Johanna ML Francis" [emphasis added].

Defendants, initially represented by the law firm Goldberg Weprin Finkel Goldstein LLP (GWFG), interposed an answer on January 21, 2016. The answer claims to be on behalf of Johanna "herself and on behalf of Phoenix Design LLC and James Francis pursuant to a certain indemnification agreement[.]" The answer contains a general denial and asserts affirmative defenses common to contract actions.

Discovery proceeded for about a year. However, in early 2017, GWFG filed an order to show cause (MS #2) seeking to be relieved as counsel for Phoenix and James Francis. The order to show cause also sought an order allowing Johanna to amend her answer and assert cross claims. While that motion was pending, James (represented by new counsel before GWFG was relieved, the Law Office of Arthur A. Hirschler) cross-moved (MS #4) for an order dismissing the action for lack of personal jurisdiction and disqualifying GWFG from representing Johanna due to a conflict of interest. In addition, plaintiff cross-moved (MS #3) for an order for either an extension of time to serve James or to have the service upon him deemed sufficient *nunc pro tunc*.

By order dated July 19, 2017 (Doc 56), another justice of this court issued one order resolving all three motions. She granted the motion of GWFG solely to the extent that GWFG was relieved from representing James, apparently forgetting about Phoenix, but otherwise denied the motion. This court notes that a motion to be relieved is not usually accompanied by a motion to amend the answer of the party which the firm is not seeking to be relieved for. It is noted that you cannot serve a cross claim on a defendant who has not been served with the summons and complaint. Plaintiff's motion, in

requesting more time to serve him, acknowledged that he had not been served. The order says that other than relieving the firm as counsel for James Francis, the motion was "in all other respects, denied." Thus, GWFG was not relieved as counsel for Phoenix. The court also granted James' cross motion to the extent that GWFG was disqualified from representing Johanna, but otherwise denied James' cross motion. Lastly, the court granted plaintiff's motion for additional time to serve James, stayed the case for sixty days to allow Johanna and James time to retain new counsel, and extended the note of issue deadline. James retained Kravet & Vogel LLP, and they acknowledged service of the summons and complaint on November 1, 2017 (Doc 72). The firm then filed a Notice of Substitution of Counsel for Phoenix (Doc 84) which states that they were substituted for GWFG.

Subsequently, James electronically filed an amended answer with a cross claim against Johanna (Doc 86), dated December 18, 2017, based on the allegation that a 2015 agreement that settled certain claims between them regarding the ARC Project required her to indemnify him against claims by (among other creditors) plaintiff herein. As nobody objected or rejected his answer, combined with the prior order which determined that James Francis had not been served with the summons and complaint, and granted plaintiff more time to serve him, the prior answer filed by GWFG on James Francis' behalf became a nullity. Discovery and motion practice resumed. Johanna retained Dimitri L. Karapelou, Esq., as her new attorney. The note of issue, requesting a non-jury trial, was electronically filed on April 19, 2018. James moved for summary judgment and plaintiff cross-moved for summary judgment and discovery sanctions against James. By order dated May 18, 2018, another Justice of this court denied both motions for summary

judgment (but directed James to appear for deposition). Subsequently, plaintiff, James and Johanna separately moved for leave to reargue the summary judgment motions; these motions were denied by the court's order dated September 16, 2019.

Trial of this action began on November 13, 2019 and continued on January 7, 2020. During the COVID-19 pandemic, trial was adjourned at counsel's request, and then continued remotely on August 4, 2020, August 5, 2020, November 24, 2020, March 10, 2021, May 25, 2021, May 27, 2021, and June 1, 2021. The court heard testimony from Richard Roberts on behalf of plaintiff, James on his own behalf and on behalf of Phoenix, Kevin Nash, a principal of GWFG and the escrow agent of an escrow account which was funded to pay the specified creditors (including plaintiff) of a building venture (referred to as ARC or The ARC Project) and Ted Donovan, another GWFG attorney, who prepared the order to show cause seeking leave to withdraw as counsel for Phoenix and James. Many documents were introduced into evidence, chief among them are the subject letter agreement proffered by plaintiff, an agreement dated February 10, 2015, among James, Johanna and other entities and natural persons, and many invoices/bills related to plaintiff's services allegedly rendered to defendants.

Several notable events occurred during the trial. First, plaintiff withdrew its quantum meruit and unjust enrichment claims, and instead agreed to proceed solely with the breach of contract claim. Also, plaintiff stated on the record that it was seeking only $195,000.00 in damages, and not the amount stated in the complaint. Moreover, plaintiff settled all claims against Phoenix and James for the sum of $71,000.00; plaintiff indicated that its only remaining claim is against Johanna for the balance of $124,000.00 ($195,000 – 71,000). Thus, the only two claims tried were Pennoni's claim against Johanna for her

alleged breach of the personal guaranty and James' cross claim against Johanna for indemnification. While the cross-claim states that it is also asserted on behalf of Phoenix, this court has not considered it to be a valid claim by Phoenix, as this entity did not challenge service, and answered the complaint. GWFG was not relieved as its attorneys: the firm was substituted by a different firm. Without leave of court, Phoenix had no permission to amend its answer or to assert a cross claim.

Additionally, during virtual proceedings on August 5, 2020, the court became aware that Dimitri L. Karapelou, Esq., did not have (as required by Judiciary Law § 470) a physical office within the State of New York. The court disqualified him as Johanna's counsel, and Joanna was given the opportunity to obtain new counsel. She did so, and retained Domenick Napoletano, Esq., as counsel. However, on November 17, 2020, Domenick Napoletano moved to be relieved as counsel for Johanna, citing a breakdown in the attorney-client relationship. By order dated November 24, 2020, this court granted the motion. Johanna did not retain new counsel and proceeded *pro se* throughout the remainder of the trial. The parties subsequently electronically filed post-trial memoranda. The court now turns to the parties' contentions.

Plaintiff asserts that the subject letter agreement constitutes a valid and enforceable contract which Johanna breached. Plaintiff also argues that Johanna's guaranty of the amount due thereunder was in effect at all relevant times and is enforceable. Plaintiff stated on the record that the amount due under the agreement is $195,000.00, which is offset by the partial settlement with James of $71,000.00, leaving Johanna liable for $124,000.00 under the personal guaranty. Since she has not paid the

balance due, plaintiff concludes that her breach of the guaranty, has been established by a preponderance of the evidence.

Plaintiff next claims that Johanna failed to prove any of the applicable affirmative defenses she asserted. Plaintiff notes that Johanna argued that the guaranty applied only to future fees—fees incurred after the letter agreement was executed—and not the previously-billed items. Plaintiff contends that, to the contrary, the testimony of its witness established that the guaranty was applicable to all of Phoenix's indebtedness. Moreover, plaintiff asserts that in the court's order denying the summary judgment motions, the court considered that argument and rejected it; plaintiff claims that the doctrine of the law of the case prevents reconsideration of this contention.

Plaintiff also argues that any assertion that any applicable statute of limitations period bars enforcement of the guaranty is also precluded by the law of the case doctrine. Plaintiff notes that the same decision which denied the summary judgment motions stated explicitly that the purported statute of limitations defense lacked merit, and, as such, this ruling cannot be reconsidered. Plaintiff notes that Johanna has claimed that the bankruptcy and associated proceedings which were related to The ARC Project somehow constitutes a defense to her liability under the guaranty. Plaintiff rejects this proposition; first, plaintiff points out that neither The ARC Project nor any associated entity is a party to the letter agreement. Plaintiff also notes that Johanna herself has not received any bankruptcy protection; moreover, plaintiff notes, personal guarantees of corporate debt generally survive the bankruptcy of the corporate debtor.[1] Alternatively, plaintiff states

1 The entity that was reorganized in a Chapter 11 Bankruptcy was The ARC Building LP.

that approximately $44,000.00 of the sum due is related to work done on The ARC Project; plaintiff asserts that if this court finds that plaintiff is not entitled to reimbursement for work done for a now-bankrupt building project, Johanna is nevertheless liable for the remaining sum, which is approximately $80,000.00.

Furthermore, plaintiff disputes Johanna's assertion that an improper and inaccurate accounting was done by Pennoni. Plaintiff notes that its witness testified that bills were routinely sent to Phoenix, which was contractually bound to object to them within 30 days; otherwise, the bills are deemed correct. The witness stated that other than minor discrepancies, the correct amount due when the trial began was approximately $195,000.00, which was reduced from the original amount demanded because of plaintiff's review of the bills and adjustments for errors. Plaintiff also claims that the evidence submitted by Johanna actually establishes her indebtedness to plaintiff instead of demonstrating any inaccurate or improper accounting.

Lastly, plaintiff asserts that this court should find that Johanna was not a credible witness and should simply disregard her testimony. To support this assertion, plaintiff claims that she gave inconsistent testimony concerning the amount due plaintiff; at certain times during trial, she testified that the billing records were incorrect, and she thus owed nothing, but in another instance, she introduced into evidence an email from someone on her staff indicating that "open bills"—the indebtedness to plaintiff—was in the principal sum of $37,198.50 for the ARC Project. Also, plaintiff notes that Johanna generally argued that the guaranty applied only to fees incurred after the subject agreement, but "spent essentially her entire testimony attempting to rebut the pre-Agreement bills, which she would not have contested if she was only liable for her post-Agreement bills." These

inconsistencies, plaintiff presses, demonstrate that this court should disregard her testimony as not credible.

In sum, plaintiff argues that it established at trial that the subject agreement is enforceable and was in effect at relevant times and that Johanna breached the personal guaranty clause therein by failing to pay the sum due. Plaintiff claims that it has thus shown it is entitled to the damages caused by that breach. Also, plaintiff maintains that Johanna failed to establish any viable defense to its claim. Accordingly, plaintiff concludes that it is entitled to judgment in the principal sum of at least $80,000.00, plus interest and (as provided for by the agreement) attorneys' fees.

In her post-trial memorandum, Johanna makes several claims unrelated to the trial of the action (e.g., assertions about how the court, during motion practice before a different justice should have allowed her to amend her answer, and how she has been "deeply prejudiced" by her former attorneys); this court must only focus on her contentions regarding the trial. She also avers that she has never been an owner or employee of Phoenix, which is solely owned and controlled by James Francis. She stated that she was the one who hired Pennoni for the Arc Project, but that all of the other bills were for work her father James had retained Pennoni to do in his capacity as Manager of Phoenix.

With respect to the cross claim for indemnification asserted against her by James, Johanna notes that this claim is based on the 2015 agreement, which they were both parties to, relating to The Arc Building LP, which filed for bankruptcy. This agreement [NYSCEF Doc 170] does contain a provision that states she will indemnify him against claims made by certain creditors (including plaintiff); however, she suggests that the evidence indicates that she complied with this provision by retaining counsel and

defending this action on behalf of Phoenix and James. Additionally, she argues that it was James who breached this 2015 agreement, which provides that no party to the agreement will cooperate with the listed creditors, and by retaining his own counsel, and successfully moving for an order disqualifying GWFG from representing her, and then by settling all claims with plaintiff, he breached the agreement. This conduct, she argues, constitutes "cooperating" with Pennoni, and thus James forfeited his right to be indemnified by her (and for any attorneys' fees).

Johanna also asserts several defenses against the personal guaranty contained in 2009 the letter agreement. She first argues that the instant action, which is based on a claimed breach of contract, is barred by the applicable limitations period. Next, she claims that the guaranty is unenforceable because she never received any consideration for it. Also, she asserts that, by its terms, the guaranty applied only to plaintiff's fees incurred after the letter agreement was executed. Moreover, she contends that plaintiff's improper billing/accounting practices preclude the recovery of the amount plaintiff claims is due. Lastly, she argues that by failing to properly make a claim in The ARC Project Chapter 11 bankruptcy case, plaintiff forfeited its right to receive any payment for work done in connection with this project. Alternatively, she suggests that the text of the 2015 agreement, along with the circumstances surrounding The ARC Project bankruptcy, indicates that James alone was responsible for ensuring that plaintiff was properly paid for the work done by Pennoni.

In sum, Johanna argues that the evidence adduced at trial shows that plaintiff is not entitled to recover against her pursuant to the 2009 letter agreement, and that James

is not entitled to recover against her pursuant to the 2015 ARC agreement. Thus, she concludes that this court should dismiss both claims.

In support of his cross claim against Johanna, James (who apparently became self-represented between the last day of trial and the date of his *pro se* post-trial memorandum) argues (Doc 182) that Johanna did not comply with the 2015 ARC agreement, which required that "Johanna shall indemnify and defend James from any such claim" asserted by specified creditors, which included plaintiff herein. He contends that she breached the agreement because she neither satisfied the claim nor defended him regarding it. Additionally, his memorandum contains allegations against his former counsel; these assertions are not relevant for the purposes of this decision, and, as such, this court will focus on his contentions about his cross claim against Johanna.

Specifically, James maintains that the evidence introduced at trial establishes the existence of the 2015 ARC agreement, and that the indemnification clause is in effect and enforceable against Johanna. Indeed, he presses, her actions and arguments during the trial indicate that she has acknowledged the validity of this indemnification clause. He argues that when GWFG withdrew as counsel for him and Phoenix, she was then required to either continue to defend them in this action or to satisfy plaintiff's claim, at least for plaintiff's work done in connection with the ARC Project.

James claims that, because of the indemnification clause, he is entitled to the applicable share of his legal expenses incurred in defending this action which are attributable to the work done by plaintiff for ARC. He further notes that approximately 23% of the unpaid sum due plaintiff unpaid was related to ARC, and he reasons that as the 2015 agreement, and Johanna's covenant to indemnify him, is exclusively concerned with

ARC, she must therefore indemnify him for approximately 23% of his attorneys' fees and expenses.

Discussion

The court has determined that it must dismiss both the plaintiff's claim and the cross claim against Johanna. First, the court (assuming that valid consideration existed for the personal guaranty, that plaintiff would continue to work) finds that no "meeting of the minds" ever took place among plaintiff, James and Johanna about the scope and meaning of the letter agreement and her personal guaranty. "In order for a breach of contract to exist, there must be a meeting of the minds on the agreement said to have been breached. Mutual assent evincing the intention of the parties to form a contract is essential, and without it, a party may not be held to the contract" (*Gomez v Bicknell*, 302 AD2d 107, 115-116, citing *Maffea v Ippolito*, 247 AD2d 366, 367; *Platt v Portnoy*, 220 AD2d 652, 653; *Franklin v Carpinello Oil Co.*, 84 AD2d 613). The testimony at trial suggested vastly different understandings of the applicable scope and meaning of the letter agreement. The agreement was not drafted by an attorney, but by Mr. Roberts, an engineer. Sometimes it refers to the present tense, sometimes to the future tense. He initialed the addition of the handwritten modification, described in the following paragraph, which makes the amount to be paid completely uncertain. "A contract is unenforceable where there is no meeting of the minds between the parties regarding a material element thereof" (*Computer Assoc. Intl., Inc. v U.S. Balloon Mfg. Co., Inc.,* 10 AD3d 699, 700). Here, the scope and meaning of the 2009 agreement and guaranty are material elements; since no meeting of the minds occurred with respect to the scope and meaning of the agreement, the guaranty is unenforceable.

Alternatively, plaintiff did not demonstrate, through a preponderance of the evidence, that it complied with all of its obligations under the agreement. Handwritten as item 7 in the agreement is "[i]n event [*sic*] there is an accounting error, it will be remedied" which was then initialed RDR for Richard Roberts, a principal of plaintiff and plaintiff's chief trial witness, as well as by James and Johanna. Contrary to plaintiff's counsel's contention, plaintiff has not shown through a preponderance of the evidence that the alleged accounting errors were in fact remedied. "[T]he essential elements of a cause of action to recover damages for breach of contract [are] the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*Hampshire Props. v BTA Bldg. & Developing, Inc.,* 122 AD3d 573, 573 [2014]). Since plaintiff herein has not demonstrated its full performance under the contract, it has thus not demonstrated a prima facie case that the contract is enforceable.

Again, in the alternative, the contract is void because material terms therein are too vague. "If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 NY2d 475, 482, *cert. denied*, 498 US 816; *see also* Restatement [Second] of Contracts § 33 [1981]). Here, the "accounting error" clause modifies an essential term of the alleged contract—the amount due thereunder. Such a term is material, and absent an objective measure—a method under which "the amount can be determined objectively without the need for new expressions by the parties" (*Id.* at 483)—the ambiguity of such term renders the contract unenforceable. Absent from the "accounting error" clause is any understanding of how the errors would be identified, by whom, how they would be remedied, or what the applicable time period for such remedies would be. Plaintiff's

argument that by agreeing to the guaranty, Johanna implicitly agreed to include other billing-error clauses which were contained in plaintiff's contracts or defendants' purchase orders with Phoenix is rejected by the court; nothing in the 2009 letter agreement indicates that she did so. For these reasons, the 2009 letter agreement, and the guaranty therein, are unenforceable.

It also should be noted that the ARC project was to be built in New York, and the other projects in the plaintiff's bills were to be built in Pennsylvania. Plaintiff did not establish that Johanna retained Pennoni for the Pennsylvania projects and agreed to pay their bills. Before this family feud began, perhaps she assisted her father with his projects. But that does not establish that she agreed to pay for the work he hired Pennoni to do for him.

The court also notes that the other two causes of action in the complaint—sounding in quantum meruit and unjust enrichment—were explicitly withdrawn by plaintiff in open court. In any event, had plaintiff failed to do so, the court notes that a party cannot both prosecute a breach of contract claim and seek equitable remedies related to the purported contract. Such equitable remedies are "predicated on a theory of implied contract or quasi-contract [and are] not viable where there is an express agreement that governs the subject matter underlying the action" (*Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 144 AD3d 1093, 1097; *see also Pickard v Campbell*, 207 AD3d 1105). Indeed, "a claim for quantum meruit generally will not lie where a contract between the parties governs the dispute" (*Skillgames, LLC v Brody*, 1 AD3d 247, 251, citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987].

With respect to James' cross claim against Johanna for indemnification, a preponderance of the evidence has not shown that she failed to perform under the 2015 ARC agreement. Indeed, it is undisputed that when the instant action was commenced, Johanna and her attorneys took up the defense for all defendants. Contrary to James' argument, a preponderance of the evidence does not show that Johanna was required to continue to defend James once GWFG moved to be relieved as counsel. Instead, the evidence suggests that James may have refused to cooperate with the defense attorneys provided for him by Johanna. Given that there is significant evidence that James refused the defense provided to him, and wanted to make cross claims against Johanna, this court cannot find that Johanna breached the indemnification provision.

Alternatively, James is not entitled to indemnification from Johanna Francis pursuant to the 2015 ARC agreement because he has breached the same agreement. As noted above, "[w]hen one party commits a material breach of a contract, the other party to the contract is relieved, or excused, from further performance under the contract" (*Markham Gardens L.P. v 511 9th LLC*, 38 Misc 3d 325, 331, citing *Grace v Nappa*, 46 NY2d 560). The subject agreement provides, unambiguously, that "[n]one of the Parties [which includes James Francis] shall cooperate with any of the above claimants [which includes plaintiff herein] except as such cooperation may be compelled by subpoena or operation of law." Here, James has voluntarily settled plaintiff's claims against him; he was not compelled to do so. He has thus "cooperate[d]" with one of the claimants identified in the 2015 ARC agreement, and, therefore, Johanna is relieved of any responsibility to indemnify him.

Lastly, this matter was litigated in the shadow of an escrow account established by the 2015 ARC agreement, which specifically makes provisions to reimburse specified creditors, including plaintiff herein, at least with regard to ARC Project. Plaintiff's contentions suggest that Johanna is responsible for the escrow agent's failure to release these funds to plaintiff for the balance of the work it performed for the ARC Project. The testimony and evidence adduced at trial, however, belies that contention. Johanna is not the only party who is required, as specified in the 2015 agreement, to consent to the release of the escrowed funds.

Submit judgment to the County Clerk dismissing both plaintiff Pennoni Associates Inc.'s complaint and the cross claim asserted by James Francis, as against Johanna Francis.

The foregoing constitutes the order, decision, and judgment of this court.

Dated: September 9, 2022

E N T E R:

Hon. Debra Silber, J.S.C.