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Majority Opinion >

SUPREME COURT OF NEW YORK, ALBANY COUNTY

A.E. Rosen Electrical Co., Inc., Plaintiff, against Plank, LLC, Defendant.

07862-7

March 1, 2019, Decided
THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Contracts—Construction Contracts—Pay-when-paid contract provision could not be utilized to effectively act as condition precedent to obligation to pay.

For Plaintiff: Lippes, Mathias, Wexler, Friedman LLP, Conor E. Brownell, of Counsel, 1 Columbia CircleAlbany, New York.

For Defendant: Phelan, Phelan & Danek, LLP, Timothy S. Brennan, of Counsel, Albany, New York.

Hon. Denise A. Hartman, Acting Justice of the Supreme Court.

Denise A. Hartman

Denise A. Hartman, J.

In this breach of contract action, plaintiff A.E. Rosen Electrical, Inc. (hereinafter plaintiff) moves for summary judgment against defendant Plank, LLC (hereinafter defendant), seeking an award of damages in the amount of $117,278.40. For the following reasons, plaintiff's motion is granted.

Background

In July 2015, defendant entered into a contract with Dutch Village, LLC (hereinafter the owner) for the construction of four apartment buildings in Menands, New York (hereinafter the project), for a total cost of $5,259,708.00. Defendant thereafter entered into several subcontracts, including one with plaintiff for electrical work in the amount of $342,600.00. In September 2016, after nine months of work, a payment dispute arose between the owner and defendant. Defendant and its subcontractors then ceased work on the project.

When negotiations to resolve the dispute failed, defendant filed a mechanic's lien against the subject property in the amount of $1,877,191.72, constituting what was owed to defendant — and ultimately the subcontractors — under the primary contract. The owner subsequently bonded the lien for the sum of $2,064,910.80. Plaintiff also filed a mechanic's lien against the property in the amount of $161,805.49. The owner later paid plaintiff $44,527.00 and the lien was reduced to $117,278.00, which is the amount at issue here.

Plaintiff commenced this action on December 7, 2017, claiming breach of contract, account stated, and violation of article 3A of the Lien Law. Defendant filed its answer on February 1, 2018, entering general denials and no defenses. On May 1, 2018, plaintiff moved for summary judgment, which defendant failed to oppose. This Court issued a default judgment on July 12, 2018. On August 7, 2018, defendant moved to vacate its default. By decision and order dated November 21, 2018, this Court granted defendant's motion, vacated the default judgment, and ordered defendant to file any opposition to plaintiff's motion for summary judgment on or before December 14, 2018. Defendant filed opposition papers and plaintiff filed submissions in reply.

Analysis

"On a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact. Only when the movant satisfies its obligation does the burden shift to the nonmovant to present evidence demonstrating the existence of a

triable issue of fact" (*Smero v City of Saratoga Springs*, 160 AD3d 1169 , 1170 , 75 N.Y.S.3d 120 [3d Dept 2018] [internal quotation marks and citations **[*2]** omitted]; *see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 , 833 , 988 N.Y.S.2d 86 , 11 N.E.3d 159 [2014]; *Roemer v Allstate Indem. Ins. Co.*, 163 AD3d 1324 , 1325 , 82 N.Y.S.3d 202 [3d Dept 2018]). "On such a motion, [the Court] must view the evidence in the light most favorable to the nonmoving party and accord such party the benefit of every reasonable inference that can be drawn therefrom" (*Aretakis v Cole's Collision*, 165 AD3d 1458 , 1459 , 86 N.Y.S.3d 626 [3d Dept 2018]).

Plaintiff has established its prima facie entitlement to judgment as a matter of law by submitting evidence of the parties' agreement; plaintiff's satisfactory performance thereunder; and defendant's failure to perform, resulting in harm to plaintiff (*see Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 139 AD3d 515 , 516 , 33 N.Y.S.3d 166 [1st Dept 2016]; *Otis El. Co. v Hunt Constr. Group, Inc.*, 52 A.D.3d 1315 , 1315 , 859 N.Y.S.2d 850 [4th Dept 2008]; *North Cent. Mech., Inc. v Hunt Constr. Group, Inc.*, 43 AD3d 1396 , 1396 , 843 N.Y.S.2d 894 [4th Dept 2007]). Specifically, plaintiff submitted a copy of its subcontract with defendant; approved change orders; the affidavit of Adam Rosen, plaintiff's owner and president; correspondence between the parties; unpaid payment applications for June, July and August 2016; a billing summary; a notice of dispute; and an affidavit from Christine Laberge, the owner's managing member.

In the parties' subcontract, plaintiff agreed to provide electrical contracting services and materials to the construction project at Dutch Village for a price of $342,560.00. The parties' approved change orders expanded the scope of the contract and raised the overall price to $357,395.49. In his affidavit, Rosen stated that plaintiff performed "each and every item of [w]ork under the terms of the [c]ontract [with defendant] and approved change orders" from December 21, 2015 until July 2016, at which time all work on the premises stopped, due solely to a dispute between defendant and the owner that was in no way caused by plaintiff or its work. At defendant's direction, plaintiff stopped work and vacated the premises, leaving behind previously-purchased materials.

Rosen stated that, as plaintiff's work on the project progressed, plaintiff submitted to defendant regular payment applications, none of which defendant contested. In total, plaintiff billed $301,835.49 for materials and work completed, including labor and retainage. Defendant paid plaintiff $140,030.00, leaving $161,805.49 unpaid. On or about January 25, 2017, plaintiff's counsel sent to defendant a notice of dispute and requested a principals' meeting. According to Rosen, this meeting was held on February 15, 2017, but the parties were unable to reach a resolution.

In support of his affidavit, Rosen submitted a February 23, 2017 letter that John Roth, defendant's sole member, sent to all subcontractors. In his letter, Roth stated that defendant did not have funds to pay the subcontractors because the owner had refused payment after May 2016 "on the illogical theory that [defendant and its subcontractors had] 'over billed' the Project's percentage of completion." Roth took the contrary position, stating that defendant believed the subcontractors' schedule of values and invoiced percentages of completion were correct.

Rosen **[*3]** also submitted a March 30, 2017 email from Carl Holsberger, defendant's contract administrator. Holsberger reaffirmed defendant's position that the owner was illogically withholding payment and that defendant "does not doubt for a moment" that the subcontractors' submitted schedules of values and invoiced percentage of completion were correct. Holsberger told the subcontractors that the owner was alleging approximately one million dollars of deficient and corrective work on the project, as supported by a report by Arcon Construction, which he attached to the email. To the extent that any work required correction, Holsberger requested the subcontractors return to the site to remedy the deficiencies identified in the Arcon report.

According to Rosen, in or about April 2017, defendant returned to the project and "took care of the limited amount of corrective [electrical] work, at no expense to [d]efendant or the [o]wner, that the [o]wner [had] requested." Rosen averred that the owner approved of plaintiff's work and, at the owner's request, plaintiff entered into a new contract with the replacement general contractor to complete the remainder of the electrical work for the project. As part of that arrangement, the owner paid plaintiff $44,527.09 for materials plaintiff had previously left at the premises

and billed to defendant. Plaintiff has reduced its claim against defendant from $161,805.49 to $117,278.40 accordingly.

Plaintiff also submitted the affidavit of Christine LaBerge, the owner's managing member. LaBerge stated that the dispute between the owner and defendant "had nothing to do with [p]laintiff's electrical work and, in fact, [the owner] never received any notice from [defendant] that [p]laintiff's electrical work had problems." According to LaBerge, the Arcon report listed "a few minor electrical issues" and that, once notified, plaintiff "immediately returned to the [p]roperty in April 2017 and corrected [them]." Following these corrections, "there were no deficiencies in the electrical work [p]laintiff [had] performed under its subcontract with [defendant] [and the owner] fully approved of all of [p]laintiff's electrical work as conforming to the design plans." Further, LaBerge affirmed that the owner had paid defendant under the parties' schedule of values for all of the electrical work that plaintiff had completed under its subcontract with defendant.

In opposition, defendant argues that there are questions of fact as to the sufficiency of plaintiff's electrical work; defendant has no present obligation to make full payment to plaintiff because it has not received full payment from the owner for plaintiff's work; and the instant motion is premature. Defendant submitted the affidavit of John Roth, defendant's sole member, along with supporting documents.

Defendant has failed to raise an issue of fact with regard to the sufficiency of plaintiff's electrical work (*see Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 139 AD3d at 516 ; *Otis El. Co. v Hunt Constr. Group, Inc.*, 52 A.D.3d at 1315 ; *North Cent. Mech., Inc. v Hunt Constr. Group, Inc.*, 43 AD3d at 1396). Defendant **[*4]** argues that the Arcon report demonstrates deficiencies in plaintiff's electrical work, the existence of which conflicts with Rosen and LaBerge's claims that plaintiff's work was sufficient. The Court disagrees. Both Rosen and LaBerge acknowledged that the Arcon report listed several deficiencies in plaintiff's electrical work. But plaintiff's submissions establish that plaintiff returned to the project site and fixed the problems, at no cost to defendant or the owner. Defendant has not otherwise demonstrated any issues of fact regarding the sufficiency of plaintiff's work.

Defendant next argues that it has no present obligation to pay plaintiff because the parties' contract contained a "pay-when-paid" provision and the owner has not yet paid defendant. But, notwithstanding a "pay-when-paid" provision, defendant cannot unreasonably delay its obligation to pay plaintiff, despite the owner's nonpayment while it attempts to resolve its dispute with the owner.

As a practical matter, "suppliers and small contractors on large construction projects need reasonably prompt payment for their work and materials in order for them to remain solvent and stay in business" (*Schuler-Haas Elec. Corp. v Aetna Cas. & Sur. Co.*, 49 AD2d 60 , 64 , 371 N.Y.S.2d 207 [4th Dept 1995]). Accordingly, a "pay-when-paid" provision that serves as an effective condition precedent to a general contractor's duty to perform is "void and unenforceable as contrary to public policy" (*West-Fair Elec. Contrs. V Aetna Cas. & Sur. Co.*, 87 NY2d 148 , 158 , 661 N.E.2d 967 , 638 N.Y.S.2d 394 [1995]; *see Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 139 AD3d at 516). It is generally presumed that parties to a construction contract do not intend "payment of the small subcontractors should await the determination of an extended legal dispute between the owner and general contractor over an issue not concerning [the subcontractor's] work" (*Schuler-Haas Elec. Corp. v Aetna Cas. & Sur. Co.*, 49 AD2d at 64). And "[a] contract provision stating that payment will occur upon a stipulated event will be construed as a time for payment provision unless there is express language to the contrary in the contract" (*West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d at 157).

Here, the parties' contract required defendant to make progress payments to plaintiff within 15 days of receiving corresponding payments from the owner. Defendant also agreed to make a final payment to plaintiff within thirty days of receiving the final payment from the owner. The contract stated that "[t]he parties acknowledge that this is a 'pay when paid' timing mechanism, and not a 'pay if paid' provision."

On its face, the parties' "pay-when-paid" clause merely regulated time of payment. Defendant cannot utilize this clause in such a way that it effectively acts as a condition precedent to its obligation to pay, thereby shifting the risk of the owner's nonpayment from defendant to plaintiff (*see*

Otis El. Co. v Hunt Constr. Group, Inc., 52 A.D.3d 1315 , 1315 , 859 N.Y.S.2d 850 [4th Dept 2008]). While this provision provides for a postponement of payment to permit defendant an opportunity to obtain funds from the owner, payment may only be delayed for a reasonable time after completion of the subcontractor' **[*5]** s work (*see Schuler-Haas Elec. Corp. v Aetna Cas. & Sur. Co.*, 49 AD2d at 64 ; *Action Interiors v Component Assembly Sys.*, 144 AD2d 606 , 607 , 535 N.Y.S.2d 55 [2d Dept 1988]; *see also Superior Site Work, Inc. v NASDI, LLC*, [2018 BL 277527], 2018 U.S. Dist. LEXIS 130932 , *76 , [2018 BL 277527], 2018 WL 3716891 , at *26 [EDNY Aug 3, 2018] [Spatt, J.]; *Power Partners MasTec, LLC v Premier Power Renewable Energy, Inc.*, [2015 BL 49749], 2015 U.S. Dist. LEXIS 22775 , at *5-6, 2015 WL 774714 , at *2 [SDNY Feb 20, 2015] [confirming arbitration award where the arbitrator determined that a "pay-when-paid" clause affords a general contractor a reasonable time to pay a subcontractor and that "three years was an unreasonable period of time to withhold payment . . . for its completed work"]).

Here, plaintiff satisfactorily completed its portion of the project well over two years ago. Two years is an unreasonable period of time to withhold payment. Defendant may not further resist payment of the remaining balance, despite the owner's nonpayment (*see Action Interiors v Component Assembly Sys.*, 144 AD2d at 607).

Defendant's last argument is that plaintiff's motion for summary judgment must be denied as premature because there has been no discovery and there are several disputed issues that warrant further investigation. Under CPLR 3212 (f) , "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." A motion for summary judgment is properly denied as premature when the opposing party has demonstrated that it "has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant" (*Greener v Town of Hurley*, 140 AD3d 1285 , 1286 , 33 N.Y.S.3d 515 [3d Dept 2016]).

Defendant argues that, in his affidavit, Rosen averred in conclusory terms that plaintiff had returned to the project and "took care of the limited amount of corrective work, at no expense to the [d]efendant or [o]wner, that the [o]wner had requested," but that Rosen provided no evidence as to the type or cost of such corrective work. Defendant claims that this information is within plaintiff's exclusive control and argues that it is material to its defense of this action because it will establish the nature and amount of deficient work defendant already paid plaintiff.

The Court disagrees. Plaintiff submitted the Arcon report, which listed the now-corrected minor deficiencies. Defendant has been in possession of this report since at least March 2017, when Carl Holsberger emailed it to the subcontractors. To the extent that defendant did pay plaintiff for work later deemed deficient by the owner, plaintiff cured such default by fixing those problems at no cost. Further, plaintiff submitted to defendant regular payment applications prior to the stoppage, when defendant was present and supervising the project. Defendant never contested plaintiff's completion percentages or quality of work. In fact, both defendant's sole member and contract administrator admitted that the subcontractors' percentages of completion and values were **[*6]** correct, stating that the owner's nonpayment was the only reason the subcontractors had not been paid.

The Court likewise finds no merit to defendant's argument that it requires discovery to determine the terms of plaintiff's subsequent contract with the replacement general contractor, including the nature of work to be completed and the amounts that plaintiff has been or will be paid under the new arrangement. Defendant contends that this information is critical to its defense because it may establish offsets to which defendant may be entitled and prevent possible double recovery by plaintiff.

Plaintiff admitted that, under the terms of the new contract, the owner paid plaintiff $44,527.09 for materials that plaintiff had previously billed to defendant. Plaintiff submitted its accounting ledger demonstrating such payment and plaintiff reduced its claim against defendant accordingly. According to Rosen, the owner made no further payments to plaintiff for work plaintiff performed under its contract with defendant. The terms of plaintiff's subsequent contract with the replacement general contractor are not otherwise relevant, as plaintiff's

damages claim is for work previously completed under defendant's direction and supervision, for which plaintiff billed defendant and both defendant and the owner approved. To the extent that defendant suggests plaintiff has been less than forthcoming, such argument is speculative and insufficient to defeat plaintiff's motion for summary judgment (*see Auerbach v Bennett*, 47 NY2d 619 , 636 , 393 N.E.2d 994 , 419 N.Y.S.2d 920 [1979]; *Dritsas v Amchem Products, Inc.*, 169 A.D.3d 526 , 94 N.Y.S.3d 264 , 2019 NY Slip Op 01177 , at *1 [1st Dept 2019]; *Stubbs v Ellis Hospital*, 68 AD3d 1617 , 1618 , 892 N.Y.S.2d 606 [3d Dept 2009]); *cf. Pank v Village of Canajoharie*, 275 AD2d 508 , 510 , 712 N.Y.S.2d 210 [2d Dept 2000]).

Accordingly, it is

Ordered and Adjudgedthat plaintiff A.E. Rosen Electrical Co., Inc.'s motion for summary judgment against defendant Plank, LLC is granted; and it is

Ordered and Adjudgedthat plaintiff A.E. Rosen Electrical Co., Inc. shall have judgment against defendant Plank, LLC in the amount of $117,278.40, plus statutory interest from July 1, 2017.

This constitutes the decision and judgment of the Court. The original decision and judgment is being transmitted to plaintiff's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and judgment does not constitute entry or filing under CPLR 2220 or 5016 and counsel is not relieved from the applicable provisions of those rules respecting filing and service.

Dated: March 1, 2019

Albany, New York

Hon. Denise A. Hartman

Acting Justice of the Supreme Court