

<b>Sam Tell and Son, Inc. v GPH Partners LLC</b>
2010 NY Slip Op 33555(U)
November 17, 2010
Sup Ct, Queens County
Docket Number: 8337/07
Judge: Orin R. Kitzes
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**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**

**PART 17**

**Justice**

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**SAM TELL AND SON, INC.,  
Plaintiff,**

**Index No.: 8337/07  
Motion Date: 11/10/10  
Motion Cal. No.: 40**

**-against-**

**GPH PARTNERS LLC d/b/a “Gramercy Park Hotel”,  
Defendant.**

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The following papers numbered 1 to 16 read on this motion by Plaintiff (“Sam Tell”) for an order, pursuant to CPLR 3212, granting summary judgment in its favor.

	PAPERS NUMBERED
Notice of Motion-Affidavit-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5
Affidavit in Opposition-Exhibits.....	6-8
Memorandum of Law.....	9
Reply Affidavits and Affirmation in Opposition-Exhibits.....	10-16

Upon the foregoing papers it is ordered that the motion by Plaintiff for an order, pursuant to CPLR 3212, granting summary judgment in its favor, is denied, for the following reasons:

According to the complaint and Plaintiff’s papers, this action was brought to recover payment from Defendant (“GPH”) for certain commercial restaurant equipment and related items that Plaintiff provided to Defendant for a project to create a high-end Chinese-style restaurant, and other food and beverage service areas within the Gramercy Park Hotel, located at 2 Lexington Avenue, New York, New York. The parties entered into an agreement wherein Defendant (“GPH”) would pay Sam Tell a flat markup of eleven percent (11%) on all equipment sales and labor charges. Thereafter, Sam Tell GPH ordered equipment from Sam Tell by GPH, and was delivered to the Hotel and installed by East Coast Kitchen Installations (“East Coast”), a sub-contractor to Sam Tell. For the products and services supplied by Sam Tell to GPH, there was a total balance of \$1,541,725.59, of which a balance of \$301,979.22 remains due and owing. The balance due and owing includes \$281,281.23 for equipment and installation, of which \$217,217.10 represents extra charges that were invoiced

after completion of the contract.

Regarding certain kitchen equipment that Sam Tell obtained from Diamond Metal, it was understood by the parties that the lead time was eight to ten weeks. This equipment was chosen for the main kitchen, room service kitchen, and dispense bar, which was to be custom manufactured according to specification. It is essential to have accurate measurements of the kitchen area before ordering custom products.

The original general contractor hired by GPH for the construction of the entire hotel and the restaurant interiors was Bovis Lend Lease (“Bovis”). GPH was dissatisfied and replaced Bovis with Shawmut Design and Construction (“Shawmut”) as general contractor to complete the build-out of the main kitchen. In early July 2006, Shawmut first took control of the kitchen area. However, since April and through July there was sheet rock and other construction material, meant for other parts of the hotel, being stored in the kitchen area, making it impossible to measure the kitchen area for the equipment order. In fact, the kitchen area was not cleared for final measurements until August. Once these measurements were taken, Sam Tell provided the final dimensions to Diamond Metal. The scheduled completion for the construction of main kitchen was by then behind the original schedule and representatives of Shawmut and GPH made the decision to have the kitchen equipment installers work overtime, in an effort to be ready by September. East Coast Kitchen Installations was doing the installation, as a subcontractor to Sam Tell. In many cases, GPH representatives communicated the overtime requests directly to East Coast orally, without signing change orders, in order not to lose critical time. Most of this requested extra labor was invoiced by East Cost after the completion of the contract. GPH then sought back charges from Sam Tell to pay for additional labor, overtime, and other charges. These back charges were first mentioned to Jerry Kouveras, Director of Engineering for Sam Tell, in October or November 2006, and were formalized with a spreadsheet presented in December 2006. These back charges were not reviewed with Sam Tell at the time GPH and Shawmut were reviewing or negotiating them amongst themselves, starting in or about November 2006. and most of these “back charges” were for regular and overtime labor costs for plumbing, electrical, drywall and acoustics, which was neither necessitated by nor requested by Sam Tell. Of the total back charges claimed by GPH, Sam Tell acknowledges responsibility for \$20,352.25.

Thereafter, Sam Tell commenced the instant action seeking payment from GPH for the equipment and installation ordered and received from Sam Tell and now seeks summary judgment in its favor. Sam Tell has submitted, *inter alia*, an affidavit and deposition

testimony from Jerry Kouveras, Richard Moon, Gerry Lyle, project manager for East Coast Kitchen Installation, and various business records that supports the above facts. GPH opposes this motion.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

The Court finds that based on the above, Plaintiff has established prima facie entitlement to summary judgment. *See, Alvarez v Prospect Hospital*, 68 NY2d 320.) Consequently, the burden shifted to Defendant to establish an issue of fact that needs to be resolved at trial. In opposition, GPH has submitted the agreements between the parties, an affidavit of David Moore, a design manager consultant to defendant GPH, correspondence between him and Jerry Kouveras, an affidavit of Alfred Bergin, a project superintendent for Shawmut Construction Corp., ("Shawmut"), and affidavits of Richard Moon and Michael Overington, consultants to GPH during the subject project to rehabilitate the Gramercy Park Hotel, and various business records regarding the project.

This evidence shows that, GPH entered into several fixed sum Agreements with Sam Tell between February and March 2006 totaling \$1,322,295.00. An integral element of the performance of Sam Tell's Agreements with GPH was their adherence to the Project schedule.

Specifically, Sam Tell was retained by GPH "to supply and furnish certain specified kitchen appliances, sinks, ovens, tables, prefabricated stainless steel kitchen wall panels ["Wall Panels"] (which contained electrical and plumbing piping within the prefabricated units), dishwashers, and assorted glasses and dishes."

All parties working on the Project were aware that it was essential that their work be completed in order to permit the opening of the restaurant in September 2006 to make the most of the well-established busy fall restaurant season in New York. Sam Tell breached its contractual obligations to GPH in several material ways, including failing to take the measurements needed to order the equipment in a timely manner and providing the equipment in

a non-defective and timely manner. Consequently, Sam Tell's actions delayed the opening of the restaurant from September 2006 to December 2006, in breach of its contractual promises and this caused GPH to incur substantial damages to complete its work in an expeditious fashion.

According to GPH, there was no impediment to Sam Tell's ability to take the measurements needed for the timely delivery of the equipment from Diamond. Additionally, the correspondence between Moore and Kouveras indicates that the parties were in agreement about the importance of adhering to a schedule that allowed for a fall opening of the restaurant, as well as that GPH was holding Sam Tell responsible for any additional charges needed to ensure that schedule. GPH claims that there is an issue of fact as to whether Sam Tell performed its contractual obligations and as to whether it should be paid despite this failure that caused substantial delays and damages to GPH.

The Court finds that there are issues of fact regarding whether or not Plaintiff performed the work required in accord with the understood time frame for the completion of the project. Urban Archaeology Ltd. v. Dencorp Invs., Inc., 12 A.D.3d 96 (1st Dep't 2004) (specification of a particular time frame within the language of the contract by itself is not determinative of whether a delay would constitute a material breach of the agreement.) Furthermore, Plaintiff does not dispute that it is required to pay Defendant for some of the back charges due to the extra work, however, there is a dispute as to how much. This issue as well whether Plaintiff breached its contractual obligations or substantially complied with them need to be resolved at trial. Burgess Steel Prods. Corp. v. Modern Telecommunications, 205 A.D.2d 344 (1st Dep't 1994.) Accordingly, the motion is denied.

**Dated: November 17, 2010**

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**ORIN R. KITZES, J.S.C.**

